83-492

No.

In the Supreme Court of the United States

October Term, 1983

MOBILE HOME ESTATES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Should an employer who asserts a good-faith doubt of an incumbent labor union's continuing majority status after expiration of a collective bargaining agreement be required to prove only the several, interrelated factors supporting that doubt, or must it prove that the union, in fact, has lost its majority status?

2. Should a seven-year delay caused by National Labor Relations Board procedural irregularities and a one hundred per cent turnover in the unit of affected employees preclude the enforcement of a National Labor Relations Board order requiring an employer to bargain with an incumbent union whose majority status was challenged?

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Petitioner, Mobile Home Estates, Inc.,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 24, 1983.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit, which was entered in this matter on May 24, 1983, is styled, *National Labor Relations Board v. Mobile Home Estates, Inc.*, and is officially reported at 707 F.2d 264 (6th Cir. 1983). It appears at App. A1.

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1. All of the parties to this petition are listed in the caption. Mini Mansions, Inc. is an affiliate of the petitioner, Mobile Home Estates, Inc.

The Decision and Order of the National Labor Relations Board is reported at 259 N.L.R.B. 1384, 109 L.R.R.M. (BNA) 1123, 81-2 NLRB Dec. (CCH) ¶ 18,704 (1982). It appears at App. A4.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 24, 1983. No petition for rehearing, or for further hearing before the full Court, has been filed.

An order signed by Justice William J. Brennan, Jr. on August 15, 1983 extended to September 21, 1983 the time to file a petition for a writ of certiorari. This petition was filed on or before that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. §§ 151-69, are set forth below:

> Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor or-

ganization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C. § 157.

Sec. 8. "(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(1) and (a)(5).

STATEMENT OF THE CASE

Statement of Facts

In March, 1972, Petitioner, Mobile Home Estates, Inc. ("Mobile Home"), voluntarily agreed to recognize Local 712, International Union, Allied Industrial Workers, AFL-CIO ("Union") as the exclusive bargaining representative of its production and maintenance employees. No representation election was held among those employees to conclusively determine their preferences as to a collective bargaining representative. Between voluntary recognition and the events in issue here, there was a 100% turnover in Mobile Home's work force.

In November, 1973, Mobile Home and the Union entered into a collective bargaining agreement covering such employees, effective from November 13, 1973 through November 14, 1976. By the end of 1976, only two of some 40 employees had also been employed at the time the col-

lective bargaining agreement was reached in November, 1973.

During the first year and a half of the collective bargaining agreement, no dues were paid to the Union by the employees despite a union shop provision in the agreement. Authorizations for check-off of the dues payments were finally provided to Mobile Home in June, 1975. At the same time, there was insufficient union interest among the employees to establish their own local union.

In the summer of 1976, a few months before expiration of the agreement and just before commencement of negotiations for a renewal agreement, the Union generated sufficient interest, at least temporarily, to establish a local union for Mobile Home employees. Even then, attendance at the 1976 Union meetings was at best minimal, averaging fewer than 16 employees at six meetings from April through September, 1976, even though this was Mobile Home's peak summer employment period when the number of production and maintenance employees ranged as high as 70 to 80.

In October and early November, 1976, Mobile Home and the Union engaged in a series of five collective bargaining sessions seeking a renewal agreement of the one due to expire on November 14, 1976. During the negotiations, the Union president resigned his position and was succeeded by a vice president who had been in Mobile Home's employ only since May of that year. On November 12, 1976, the Company presented its final contract offer. The Union membership rejected that offer and scheduled a strike to begin five days later, informing Mobile Home on November 14, 1976 of that intent.

The strike commenced shortly after midnight on November 19-20, 1976. At the time of the strike, only 14 of

more than 40 employees had at least six months of service with Mobile Home, almost all of whom ignored the picket lines and worked during the strike. The strike lasted through December 1, 1976, a period of only seven work days (exclusive of Thanksgiving), ending as a result of a meeting of about a dozen employees that evening. As one bargaining committee member said: "We felt we were losing our strength."

No negotiating meetings were requested or held between the "final offer" meeting of November 12 and the termination of the strike on December 1. No Union membership meetings were scheduled or held after December 1, 1976, despite the fact that the Union's secretary, whose job included posting meeting notices, was employed continuously following the termination of the strike.

Following the Union's November 14 strike notice, most, if not all, high seniority employees executed a document ("petition") stating that they did not wish to be represented by the Union. Prior to commencement of the strike, four of seven local Union officers resigned from their Union office, and three of the four also signed the "petition," along with ten fellow employees. Mobile Home President Newman found the "petition" in his mailbox before receiving a letter from the Union requesting resumption of negotiations.

With full knowledge of the Union's history (recounted above), and following an apathetic (nine pickets), abbreviated (seven work days), and unsuccessful strike, during which almost all employees with six months or more seniority worked, most actually resigning from the Union, Mobile Home refused to provide information and to meet with the Union when so requested by letter of December 10, 1976. Mobile Home properly had serious doubt as to

whether the Union had majority support among its employees. At no point during these proceedings did the General Counsel prove, or offer or attempt to prove, that the Union did, in fact, enjoy majority support on December 10, 1976.

Proceedings Below

With the withdrawal of recognition from the Union in December, 1976, Mobile Home set off on a tortuous expedition through the Board's tangled procedural jungle—an expedition that has now led, some seven years later, to an order that it bargain with a Union that was largely repudiated by its employees at the outset of the expedition. The long delay, attributable to procedural aberrations on the Board's part, has produced a situation in which there has been a 100% turnover in Mobile Home's work force since the Union was voluntarily recognized.

The procedural history of the case can be simply described. The matter was heard before the first administrative law judge on six days in May and June, 1977. More than a year passed before he issued a woefully insufficient decision on September 29, 1978. (App. A101.) Exceptions to this decision were filed on both sides, largely attacking its incompleteness in making credibility resolutions and specific findings of fact. Nearly a year later, on July 12, 1979, the Board issued an order remanding the case to the administrative law judge for completion. (App. A97.)

On February 25, 1980, the Board advised the parties that the first administrative law judge had retired without completing his decision in accordance with the Board's order. (App. A95.) A second administrative law judge was appointed to reconsider the evidence and issue a decision.

A year passed before his decision was issued on March 16, 1981. It was, for the most part, in Mobile Home's favor. (App. A13.)

Exceptions again were filed by both parties. Finally, on February 4, 1982, more than five years after the events in issue, the Board issued a complete and final Decision and Order. (App. A4.)

Subsequently, the Board petitioned the United States Court of Appeals for the Sixth Circuit for enforcement of its order. The Sixth Circuit, on May 24, 1983, refused to enforce the Board's order that Mobile Home had committed an unfair labor practice by refusing to reinstate two economic strikers. On the issue of the withdrawal of recognition by Mobile Home, the court of appeals perfunctorily affirmed the Board's order—the only indication of its rationale being that the "decision of the administrative law judge in this case [as affirmed by the Board] reflects a thorough and conscientious canvassing of the record." (App. A3.)

The case now stands before this Court nearly seven years after the withdrawal of recognition of the Union, during which time there have been wholesale changes in Mobile Home's work force. The only delays of any sort attributable to Mobile Home stem from its pursuit of valid appeals that were substantially upheld. The many avoidable and unnecessary delays are attributable to the Board's fumbling adjudication of the case.

REASONS FOR GRANTING THE WRIT

1. The Federal Courts of Appeals Are in Hopeless and Confusing Disarray As to the Circumstances in Which An Employer May Lawfully Withdraw Recognition From an Incumbent Union

a. Introduction

Section 8(a)(5) of the Act requires an employer to bargain in good faith exclusively with a union representing a majority of its employees. However, under some circumstances, an employer can refuse to bargain with a previously-selected union on the basis that it no longer has the support of a majority of the employees in the appropriate bargaining unit.

During the term of a collective bargaining agreement, an employer is bound by an irrebuttable presumption that the signatory union has majority support. A refusal by the employer to recognize and bargain with the union during this period of conclusive majority status is a per se violation of Section 8(a)(5). *See Precision Striping, Inc.*, 245 N.L.R.B. 169 (1979), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981).

After the agreement expires, the presumption that the union enjoys majority status continues, but becomes rebuttable. The employer can rebut the presumption and withdraw recognition from the union by establishing *either* that the union no longer commands majority support *or* that the employer in good faith has reasonable grounds based upon objective considerations to doubt the union's continued majority status. *Brooks v. NLRB*, 348 U.S. 96, 103-04 (1954); *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805 (2nd Cir. 1978); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970).

The circuits are sharply divided as to the standards an employer must meet in order lawfully to withdraw recognition on the basis of a good-faith, objectively-based doubt of the union's continued majority support. The Ninth Circuit and the Sixth Circuit in essence require the employer to prove that a majority of the employees do not support the union. The Fifth, Seventh and Eighth Circuits, on the other hand, require that the employer make a lesser showing of the objective factors, which, taken together, support a good-faith doubt as to the union's continued majority status, even though those factors, in sum or individually, do not conclusively establish the union's loss of majority support. After such a showing, the burden shifts to the General Counsel and the charging party, the incumbent union, to prove that the union did represent a majority of unit employees to support a finding of a violation of Section 8(a)(5) of the Act.

This clear dichotomy in approach among the circuits requires this Court to intervene and formulate a single standard to be applied in withdrawal of recognition situations. Otherwise, inconsistent application of fundamental labor law policies assuring employees freedom of choice in selecting their bargaining representatives will persist, and enforcement of the Act will continue to be determined *not* by the mandates of the law and its underlying objectives, but rather by the geographical location of the allegedly offending employer.

b. The Sixth and Ninth Circuits

In the proceedings below, the administrative law judge, whose opinion was adopted virtually *in toto* by the Board and the Sixth Circuit, was presented with evidence of several objective factors that gave rise to a good-faith doubt on the part of the employer as to the Union's

continued majority support. Some of those factors emphasized the lackluster support the Union had received among Mobile Home's employees in the years prior to the strike: (1) the Union was *voluntarily* recognized without an election in February, 1972; (2) the Union failed to obtain a collective bargaining agreement until nearly two years later in November, 1973; (3) although the agreement contained a dues check-off provision, no authorizations for dues check-offs were provided to the employer until June, 1975; (4) interest in the Union among the employees was insufficient to support establishment of a local union until 1976, at which time substantially less than a majority of the unit employees attended meetings establishing the Union; (5) even after establishment of the local Union, Union officers had to be appointed, rather than elected, because of lack of interest among unit employees.

Although the aforementioned factors admittedly do not alone establish a doubt as to the majority status of the Union, those factors do shed some light on the depth of the Union's support among unit employees in 1976. They are certainly relevant in determining whether, coupled with other more directly probative factors, Mobile Home rightly began in late 1976 to entertain a serious doubt as to the employees' support for the Union. Several cases have recognized the importance of such evidence.[2] Nonetheless, the administrative law judge, with the concurrence of the Sixth Circuit, refused to consider these factors,

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2. *See NLRB v. Triplett Corp.*, 619 F.2d 586, 587 (6th Cir. 1980); *Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77 (9th Cir. 1977); *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974); *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546 (7th Cir. 1970); *NLRB v. Laystrom Manufacturing Co.*, 359 F.2d 799, 800 (7th Cir. 1966); *Hirsch v. Pick-Mt. Laurel Corp.*, 436 F. Supp. 1342, 1357 (D.N.J. 1977).

cavalierly observing that "they really have nothing to do with the majority status of the Union." (App. A76.)

The administrative law judge also refused to consider several events occurring after commencement of the strike as having any bearing upon the majority status of the Union. He accorded no weight to the following factors: (1) four of seven local Union officers resigned from office before the strike; (2) about one-third of the unit employees, including most long-term employees, worked during the entire strike; (3) the strike continued for only seven work days and was actively supported by only a handful of employees; and (4) the strike abruptly terminated without any concessions from the employer and with an admission by a member of the Union's negotiating committee that it simply died for lack of employee support.

In rejecting these factors, the administrative law judge regurgitated traditional Board theory that lack of support for or opposition to a strike among bargaining unit employees or the failure of the strike itself, considered in isolation, do not justify a withdrawal of recognition from the incumbent union. Indeed, if these factors are considered separately and in isolation, disregarding the other factors that go before and follow them, it follows that none alone gives rise to an objectively-based, good-faith doubt as to the majority status of the incumbent union. Other cases have, though, properly recognized that the failure of an incumbent union to win support among bargaining unit employees for a strike call may very well, when considered in conjunction with other events, serve as part of the objective basis supporting an employer's withdrawal of recognition.[3]

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3. *See Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *National Car Rental System, Inc. v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 728 (5th Cir. 1978).

After dismissing the foregoing factors as being in no way relevant to the majority status of the Union, the administrative law judge proceeded to dispatch the notion that the 100% turnover in the employer's work force since the voluntary recognition of the Union in 1972 could be considered. While it stands to reason that substantial turnover in the employer's work force in the period since recognition of the incumbent union may properly be considered in determining whether the union has continued to enjoy majority status,[4] the Board has insistently refused to consider such evidence. Instead, the Board has steadfastly adhered to its ancillary presumption that new employees support the incumbent union in the same proportions as did the former employees who originally chose the union as their bargaining representative.

Again, by evaluating evidence of substantial employee turnover in strict isolation without regard to other factors that indicate that newly-hired employees may not support the incumbent union to the same degree as their predecessors, the administrative law judge refused to consider the cumulative weight of all factors in determining whether the employer had an objective basis to doubt the Union's majority support among employees. Instead, the administrative law judge employed the artifice of considering, and then rejecting, each relevant factor on a one-by-one basis.

The final piece of evidence proffered to the administrative law judge was that approximately one-third of the bargaining unit employees, including a majority of the

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4. *See National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974); *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 547 (7th Cir. 1970).

Union's negotiating committee and virtually all long-term employees, signed a "petition" resigning from the Union prior to commencement of the strike. Such "petitions" signed by even smaller percentages of the bargaining unit have routinely been accorded substantial weight in supporting an employer's claimed doubt as to the majority status of an incumbent union.[5] The administrative law judge, however, training his scrutiny solely upon the four corners of the "petition" without regard to other events, concluded that the overt resignation from the Union of one-third of the bargaining unit was of no relevance in assessing whether Mobile Home had cause to doubt the Union's majority support. Incredibly, the administrative law judge observed that the "petition" supported the General Counsel's position, creating yet another presumption that those employees who did not sign the "petition" were presumed to still have supported the Union, with the result that it was "mathematically clear that the Union represented a majority of the employees." (App. A77.)

The administrative law judge's treatment of the resignation "petition" is indicative of the true standard applied by him in evaluating whether Mobile Home had committed an unfair labor practice in withdrawing recognition from the Union—a standard ultimately adopted by the Sixth Circuit. That standard was that Mobile Home was required to bear the burden of proving that the Union did *not* represent a majority of the unit employees. After considering and rejecting in consecutive order the objective bases offered by Mobile Home, the administrative

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5. *See NLRB v. Triplett Corp.*, 619 F.2d 586, 587 (6th Cir. 1980) (resignation by one-sixth of employees in unit); *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 728 (5th Cir. 1978) (resignation by 19 of 177 unit employees); *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974) (resignation by 47 of 222 unit employees).

law judge finally concluded that "under Board precepts Respondent has produced no credible evidence to demonstrate other than what the Union continued to represent a majority of Respondent's employees." [*Sic.*] The administrative law judge went on to observe that "[o]n this basis, it is clear that Respondent violated Sections 8(a)(5) and (1) of the Act." (App. A79.)

Stripped to its essentials, the rationale of the administrative law judge, the Board and the Sixth Circuit is that, in order to justify withdrawal of recognition from an incumbent union, an employer must prove, by a preponderance of the evidence, that the union has lost majority support among unit employees. *A fortiori,* the employer is *not* justified in withdrawing recognition from an incumbent union even when several, objective, interrelated factors strongly suggest that the employer has a sound basis for its good-faith doubt.

The rationale adopted by the Sixth Circuit in this and other[6] cases tracks the reasoning of the Ninth Circuit in *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d 293 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979), cited with approval in *Cain's Generator and Armature Co. v. NLRB,* 628 F.2d 933, 934 (6th Cir. 1980). In that case, the employer based its claim of good-faith doubt on employee statements of discontent with the union, a high employee turnover rate, lack of union activity in processing grievances, a low rate of union membership, union financial difficulties, and union admissions of lack of membership. The Ninth Circuit, employing the same analysis utilized by the administrative law judge in this case, separately considered each factor, and concluded that "[n]one of

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6. *See Cain's Generator and Armature Co. v. NLRB,* 628 F.2d 933 (6th Cir. 1980); *NLRB v. Washington Manor, Inc.,* 519 F.2d 750 (6th Cir. 1975).

the evidence is wholly referrable to a decline in Union support within the relevant units." 584 F.2d at 308.

Several of the factors proffered by the employer were discounted by the Ninth Circuit on the basis of various presumptions fashioned by the Board. For example, the court rejected evidence of high employee turnover by employing the presumption that new employees support the union in the same ratio as the employees they replace. Unable to find any single factor that conclusively demonstrated that the union had lost majority support, the court held that the employer had failed to carry its burden, and had violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition from the union.

It has been recognized that, for all practical purposes, the Ninth Circuit's holding in *Tahoe Nugget* requires the employer to establish that the union has lost majority support among unit employees as a prerequisite to the employer's withdrawal of recognition from the union, and that other evidence demonstrating a good-faith doubt as to the union's majority status, no matter how substantial, is insufficient:

> "The *Tahoe Nugget* court apparently expected the employer to prove the union's actual loss of majority status, not merely its own good-faith doubt. All of the evidence the court considered, both individually and cumulatively, may have been only marginally probative of actual loss of support. The evidence did, however, have more probative value on the issue of good-faith doubt. If the court had used the employer's evidence to decide only this issue, the cumulative weight of all the evidence would have been substantial. It is certainly possible that the employer in *Tahoe Nugget* reasonably and in good faith doubted that the union had majority support. The *Tahoe Nugget* court

> and the Board opted for the *Celanese* approach, however, interpreting the good-faith-doubt test to require the employer to disprove actual majority status." Comment. *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 727-28 (No. 4 1981).[7]

Although the Ninth Circuit in *Tahoe Nugget* speaks in terms of the employer establishing its good-faith doubt about the majority status of the union, it proceeds to reject, seriatim, all the traditional factors advanced by employers as a basis for a good-faith doubt, either by rejecting the particular factors as being irrevelant, or, when relevant, by rebutting the factor with one of the ancillary presumptions fashioned by the Board. In the end, the only evidence that will suffice is for the employer to prove that the incumbent union has, in fact, lost majority support among unit employees. *See id.* at 734-35.

Indeed, in subsequent cases, the Ninth Circuit has explicitly acknowledged that an employer must, in its view, prove that the union has lost majority support in order to lawfully withdraw recognition:

> "In *Tahoe Nugget* and *Sahara-Tahoe* we stressed that the evidence presented to establish reasonable good faith doubt, individually or cumulatively, must unequivocally indicate that union support declined to a minority." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 579 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

See also: *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 631 (9th Cir. 1983); *N. T. Enloe Memorial Hospital v. NLRB*, 682 F.2d 790 (9th Cir. 1982).

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7. The *Celanese* approach refers to the decision of the National Labor Relations Board in *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951).

The *Tahoe Nugget* approach, as applied by the administrative law judge and the Sixth Circuit in this case, places the employer in an untenable position. Confronted with evidence that the incumbent union has lost majority support, the employer must choose between two equally undesirable alternatives. The employer can ignore that evidence, proceed to bargain with the incumbent union, and run the risk of committing an unfair labor practice by bargaining with a minority union that does not enjoy the majority support of its employees. *See International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). Alternatively, it can attempt to prove that the union has lost majority status, and then withdraw recognition. But it is virtually impossible for the employer to do so. The only way for it to carry its burden is to question or poll employees on their attitude toward the incumbent union, which will almost invariably constitute an unfair labor practice. *See Bartenders, Hotel, Motel & Restaurant Employers Bargaining Assn.*, 213 N.L.R.B. 651, 657 (1974); *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1067 (1967).

Other circuits have fashioned a more sensible approach to this issue, recognizing that an employer can withdraw recognition from an incumbent union by proving *either* that the union no longer commands majority support *or* that the employer, in good faith, has reasonable grounds based upon objective considerations to doubt the union's continued majority status, and further recognizing that the two standards are, as the words suggest, truly separate and distinct. More importantly, the approach taken in these other circuits serves to protect the paramount Section 7 rights of employees "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157.

c. The Fifth, Seventh and Eighth Circuits

The analysis developed in other circuits carefully distinguishes the good-faith doubt test for withdrawal of recognition from the issue of actual majority status. In those circuits, the evidence presented by the employer is viewed in its entirety to determine whether it provides the basis for the employer's good-faith doubt. If so, the employer has carried its burden of rebutting the continued presumption of majority status of the incumbent union, and the burden then shifts to the General Counsel, and the charging party, the incumbent union, to establish that the union did, in fact, have majority support at the time recognition was withdrawn.

The leading case espousing this view, the facts of which have been said to not "materially differ" from those of *Tahoe Nugget*, is *Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98 (7th Cir. 1980). *Id.* at 728 n.61. The employer in that case introduced several factors indicating that the union had lost majority support, including a 70% turnover rate among unit employees, statements by employees of dissatisfaction with the union, lack of properly elected union officers, low attendance at union meetings, failure of union officers to participate in negotiations for a collective bargaining agreement, and failure of the union to process grievances during the first contract.

Although confronted with evidence strikingly similar to that presented to the Ninth Circuit in *Tahoe Nugget* and to the Sixth Circuit in this case, the Seventh Circuit reached the opposite conclusion, holding that the employer had rebutted the continuing presumption of majority status by establishing that it had an objectively-based, good-faith doubt as to the majority status of the union. The burden then shifted to the General Counsel to prove that the union had actual majority support among the employees.

In contrast to the approach of *Tahoe Nugget*, the court observed that the objective evidence presented by the employer had to be viewed in its entirety, rather than individually analyzed in isolation and then ultimately rejected.

> "The Board, in its argument that the evidence confronting the Hospital was inadequate to justify a good faith doubt, relies upon a series of cases stating that the individual elements the Hospital relies upon, standing alone, are insufficient. [Citations omitted]. However, in doing so, the Board ignores the fact that Bohard and the Hospital had the sum total of many factors before them indicating a loss of the Union's majority status. . . . Case law establishes that it is the cumulative effect of all the evidence presented to the employer which is the relevant consideration, not each element considered separately. [Citations omitted]. Even were we to agree, therefore, that some of the individual elements might not, in themselves, justify a good faith doubt, or even that the sum total of the evidence might not support a finding that the Union had, in fact, lost its majority status, *see Hershey Chocolate Corp.*, 121 NLRB 901 (1958), we think the record without reasonable dispute indicates that the Hospital had sufficient objective evidence before it on which to base a reasonable doubt of the Union's continued majority support. The Hospital's presentation was sufficient, at least, to shift the burden to the General Counsel to establish the Union's majority. *Orion*, supra at 85. The General Counsel made no such showing." *Id.* at 103-04.

As the General Counsel failed to carry his burden, the Seventh Circuit denied enforcement of the Board's bargaining order.[8]

Under the Seventh Circuit's analysis, an employer is not required to affirmatively prove that the union has lost majority support as a prerequisite to withdrawing recognition:

> "Further, to rebut that presumption [of the union's continued majority status], the employer need not prove that the union no longer represents a majority of the employees, but only that at the time it refused to bargain there were sufficient objective considerations to support a reasonable doubt of the union's majority status." *Star Manufacturing Co. v. NLRB*, 536 F.2d 1192, 1195 (7th Cir. 1976).

The differences between the standards applied by the Seventh Circuit and those applied by the Sixth Circuit in this case and the Ninth Circuit in *Tahoe Nugget* and its progeny could not be more clear.

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8. *See also Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970); *NLRB v. Laystrom Manufacturing Co.*, 359 F.2d 799 (7th Cir. 1966). In the *Ingress-Plastene* case, the Seventh Circuit criticized the Board's attack upon the objective factors cited by the employer in support of its good-faith doubt:

> "Although the Board attacks each of the reasons advanced by the company in support of its good faith doubt of the union's majority status, the company does not rely on any one reason alone, but rather on all as a whole. We think the entire record, including evidence against the Board's position as well as in favor of it, Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), supports the company's position. We note that the union's majority has never actually been asserted by the Board and, in fact, is in serious doubt from the record." 430 F.2d at 547.

The Seventh Circuit's criticism in *Ingress-Plastene* is equally applicable to the analysis of the administrative law judge and the Sixth Circuit in this case.

The Seventh Circuit's analysis was applied by the Eighth Circuit in *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974). The employer there claimed that a good-faith doubt as to the incumbent union's majority status had arisen as a result of the filing of a decertification petition by 30% of the employees, a decrease in union dues check-offs among the employees, substantial employee turnover, and resignations by 47 of 222 unit employees. Adopting "the reasoning of the Seventh Circuit," the Eighth Circuit held that the employer had established a good-faith doubt as to the union's majority status, shifting the burden to the General Counsel:

> "The law judge considered those elements seriatim and concluded that none of them individually would constitute a sufficient basis for a good faith refusal to bargain. While the Board's separate analyses are arguably supportable, when they are considered together we believe that good faith doubt has been demonstrated at least to the point of requiring the General Counsel to come forward with evidence that the union did represent a majority of the employees in the unit on the refusal to bargain date. This the General Counsel did not do." 494 F.2d at 194.

The court observed that "whether or not any one of the above factors would itself support an objective good faith doubt, it is not true that all reasons collectively would be insufficient." 494 F.2d at 195.

The Fifth Circuit is in accord with this approach. In *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), the employer introduced evidence that approximately one-third of the unit employees worked during all or part of the strike, that the strike had resulted in an approximately 25% turnover in the employer's work

force, that 19 of 177 unit employees resigned from the union during the strike, and that a union representative had stated that approximately 20% of the strikers would not be returning to work. Although unable to demonstrate conclusively that a majority of the employees no longer supported the union as the *Tahoe Nugget* court would require, the employer was held by the Fifth Circuit to have "made permissible inferences from solid evidence—the number of returning strikers, the Union resignations, the number of replacements, and the Union Representatives remark—which in our view were sufficient to support a reasonable doubt of the Union's continued majority status." 584 F.2d at 729. The Board's contrary decision was said to rest "on presumptions we deem inapplicable" and "on the rejection of inferences we consider permissible." *Id.* Absent evidence from the General Counsel that the Union did enjoy majority support, the court held that the employer had established a good-faith doubt as to the union's majority status and was permitted to withdraw recognition on that basis.

The obvious effect of the analysis adopted by the *Bellwood* court and the Fifth and Eighth Circuits is to place the burden of demonstrating actual majority status upon the General Counsel and the charging party, the incumbent union. The Board itself at one time recognized that this allocation is appropriate, since the union is in a much better position than an employer to prove majority support:

> "Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's

> membership lists and direct interrogation of the employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit." *Stoner Rubber Co.*, 123 N.L.R.B. 1440 (1959).

The union enjoys an additional advantage in proving majority support. Unlike the employer, it is free to question employees concerning union sentiment. *See* R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 176 (1976).

By placing the burden to prove actual majority status upon the party best able to carry it, the *Bellwood* analysis protects the Section 7 rights of employees to select their own bargaining representatives. Under *Tahoe Nugget*, an employer faced with even substantial evidence raising a doubt as to the incumbent union's majority status is saddled with the hopeless burden of proving that the union has actually lost majority support among unit employees. The not unexpected result will be that, in most cases, the employer will continue to recognize and bargain with the union, even though a majority of the employees may not wish to be represented by that union.

Under *Bellwood*, persuasive objective evidence that the union has lost majority support is sufficient to shift the burden to the General Counsel and the incumbent union to prove that the union does enjoy majority support among the employees. While *Tahoe Nugget* plainly in-

fringes upon the employees' right to freedom of choice, the *Bellwood* analysis protects that right by requiring actual proof, from the only party practically able to furnish it, as to the preferences of the employees whose wishes are in dispute.

Since the imposition of a bargaining order after an employer has withdrawn recognition from a union has such important consequences for the employees' Section 7 rights, this Court must resolve the conflict among the circuits as to whether and when an employer may withdraw recognition from a declining union. In so doing, the Court should assure that, once a good-faith doubt has been established, no bargaining order should issue unless and until the General Counsel can prove that the employees, whose interests are at stake, continue to accord the incumbent union majority support.

2. There Is a Clear Split Between the Sixth Circuit and the District of Columbia Circuit As to the Propriety of a Bargaining Order When a Substantial Period of Time Has Passed Since the Withdrawal of Recognition

Even assuming, *arguendo*, that the Sixth Circuit properly concluded that Mobile Home's withdrawal of Union recognition was unlawful, an additional question arises as to whether the perfunctory entering of a bargaining order is appropriate. Faced with nearly identical evidence of delays in the Board's handling of claimed unfair labor practices resulting from a withdrawal of recognition, the District of Columbia Court of Appeals has refused to enforce the Board's usual bargaining order, and, instead, remanded the case to have the Board consider whether a new election might not be the best method to serve the objectives of the Act, including the protection of the Section 7 rights

of current employees to select their own bargaining representatives.

The events upon which this proceding is based occurred in *November and December, 1976.* Since that time, the Board's fumbling adjudication of the case has resulted in interminable delays, including an initial delay of some four years before a full and complete decision by an adminstrative law judge had been issued. Under these unusual procedural circumstances, involving unconscionable delays not attributable to the employer, it was incumbent on the Sixth Circuit to consider whether a bargaining order would best effectuate the purposes of the Act, i.e., the promotion of industrial stability while maximizing employee free choice. By perfunctorily approving a bargaining order in this case, the Sixth Circuit has maximized *union* stability at the expense of employee free choice.

It is undisputed that no employees remain from the original unit the Union was authorized to represent in 1972. In light of the employer's turnover rate, it is clear that the employee complement at the time the administrative law judge rendered his decision in 1981 was entirely different from the one that existed some four years earlier in December, 1976. Under these circumstances, the purposes of the Act are best served by an election order rather than a bargaining order.

In *Peoples Gas Systems, Inc. v. NLRB,* 629 F.2d 35 (D.C. Cir. 1980), the District of Columbia Court of Appeals considered a lengthy procedural history similar to the instant case. There the court found that an employer had improperly withdrawn recognition from an incumbent union, but refused to enforce the Board's bargaining order remedy, because an "extraordinary amount of time has elapsed since the initial refusal to bargain in the spring

of 1973, most of which can be attributed to the Board and this court." *Id.* at 47.

The court criticized the Board's automatic use of bargaining orders, observing that the Board's approach "apparently regarded the employees' wishes as of no consequence whatsoever in determining a remedy." *Id.* at 47. According to the court, "bargaining orders do not automatically flow from a refusal to bargain if it is not clear that the employees desire the Union as their representative." *Id.* The court concluded by remanding the case to the Board with instructions to assess the appropriateness of an election.

The differences in the reasoning and holdings in *Peoples Gas Systems* and the instant case are obvious. The unusually long span of time from Mobile Home's alleged violation to imposition of the bargaining order remedy, the good faith nature of its asserted doubt of a majority status, the probability of a substantial, if not complete, turnover of its work force with the result that a union is being thrust upon a group of employees, not one of whom has ever selected or supported it, and the lack of evidence that a free and fair election could not be held—all these factors militate against imposition of a bargaining order. The Sixth Circuit has failed to recognize that "[e]mployee Section 7 rights thus play an important role in the selection of a remedy." *Id.* at 49.

For these reasons, this Court should refuse enforcement of the Board's proposed bargaining order. The Court should reconcile the differences between the circuits and assure that, in fashioning a remedy for unlawful withdrawals of recognition, "the expressed wishes of the employees must be accorded a heavy weight in the balance." *Id.*

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit in this case exemplifies a sharp division among the circuits as to the standards governing the determination of and remedy for alleged unfair labor practices arising from employer withdrawals of recognition from an incumbent union. In determining the issues in this case, the Sixth Circuit has adopted an approach that significantly intrudes upon the fundamental Section 7 rights of employees to bargain through representatives of their own choosing.

The petition for a writ of certiorari should be granted to allow the Court the opportunity to establish a uniform approach for the National Labor Relations Board and Courts of Appeals to deal with these recurrent issues.

Respectfully submitted,

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83-492

No.

In the Supreme Court of the United States

October Term, 1983

MOBILE HOME ESTATES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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September 21, 1983

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed May 24, 1983)

No. 82-1240

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MOBILE HOME ESTATES, INC.,
Respondent.

ON APPEAL from the National Labor Relations Board.

Before: LIVELY and ENGEL, *Circuit Judges*; and WEICK, *Senior Circuit Judge.*

PER CURIAM. The National Labor Relations Board petitions this court to enforce its decision and order, reported at 259 NLRB No. 182, in which it found the respondent in violation of Section 8(a)(1) and (5) for refusing to bargain with the International Union, Allied Industrial Workers, AFL-CIO, and in violation of Section 8(a)(1) and (3) for refusing to reinstate lawful economic strikers. The Board also found the respondent in violation of the Act for interrogating employees and encouraging them to cross the picket line in event of a strike. The respondent does not contest the latter finding.

[2] The employer voluntarily recognized the union in 1972, but when its first contract expired the union rejected the employer's final offer and a strike ensued which lasted for about 10 days. After the strike ended and work resumed at the employer's establishment the union requested bargaining and demanded a list of current employees with addresses, dates of hire and rates of pay. The employer refused to bargain or to deliver this information to the union. The employer also refused to rehire two probationary workers who had joined the strike. The employer contended that it had a good faith, justified belief that the union had lost majority support and that it had accordingly withdrawn recognition of the union to give its employees an opportunity to determine for themselves whether they desired to be represented by the union. The employer also contended that it refused to rehire two probationary striking employees for legitimate business reasons and that this refusal was not a violation of the Act.

The administrative law judge found that withdrawal of recognition from the union was a violation of the Act, but that the employer was justified in not rehiring the two probationary employees. The Board agreed with the administrative law judge with respect to withdrawal of union recognition, but found that the employer had failed to establish legitimate reasons for refusing to rehire the two striking probationary employees and ordered them reinstated with back pay. The Board also adopted the recommendation of the administrative law judge and ordered the employer to bargain with the union.

The employer maintains on appeal that it did not violate the Act by withdrawing recognition under the circumstances disclosed by this record and even if withdrawal was a violation of the Act, the remedy is improper. The

latter argument rests primarily on the fact that more than six years have now expired since recognition was withdrawn and the present work force consists of people who were never members of the union. The employer also contends that the finding [3] of the Board that it violated the Act by refusing to reinstate two probationary employees is not supported by substantial evidence.

Upon consideration of the briefs and oral arguments of counsel together with the record before the court, we conclude that the Board properly decided all of the issues except that relating to reinstatement of the two probationary employees. The decision of the administrative law judge in this case reflects a thorough and conscientious canvassing of the record. We conclude that the determination of the administrative law judge that the employer did not violate the Act by refusing to reinstate two probationary employees is supported by the record and that the decision of the Board to the contrary is without support. Accordingly, the order of the Board is hereby enforced to the extent that it found the employer in violation of Section 8(a)(1) and (5) for refusing to bargain with the union and in ordering the employer to bargain. Enforcement is denied with respect to that portion of the Board order which directs the reinstatement of probationary employees, John Carpenter and Dale Thomas. The order and notice will be modified accordingly.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Dated February 4, 1982)

Case 8—CA—10691

259 NLRB No. 182

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOBILE HOME ESTATES, INC.

and

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS, AFL—CIO AND ITS LOCAL 712

DECISION AND ORDER

On March 16, 1981, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and briefs in support thereof and in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings, findings,[1] and conclusions[2]

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1. The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. [2] Administrative Law Judge Ivar H. Peterson conducted the hearing in the instant case in May 1977. Following the issuance of his Decision, the Board remanded the case for additional findings. Before issuing a Supplemental Decision, however, Administrative Law Judge Peterson retired. After obtaining statements of position from the parties, the Board issued an order remanding the case for a hearing *de novo* by a new administrative law judge. Subsequently, however, the Board approved a stipulation entered into by the parties that the case be decided by a new administrative law judge based on his own review of the original record and his own findings of fact and credibility resolutions independent from the Decision previously issued by Administrative Law Judge Peterson. Thereafter, Administrative Law Judge John M. Dyer was assigned to issue a decision. It is the Board's established policy to attach great weight to an administrative law judge's credibility findings insofar as they are based on demeanor. However, in contested cases the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the administrative law judge's findings of fact, but bases its findings upon a *de novo* review of the entire record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3d Cir. 1951). Administrative Law Judge Dyer's credibility findings are based on factors other than demeanor, and in consonance with the Board's policy set forth in *Standard Dry Wall Products, Inc., supra*, we have independently examined the record in this case. We find that there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon.

2. Employee Hicks testified to a conversation on November 15 or 16, 1976, with Director of Marketing Miller, in which the latter allegedly asked her whether she intended to cross the picket line in the event of a strike. Miller denied having any conversation with Hicks. The Administrative Law Judge, assuming *arguendo*, without deciding, the truthfulness of Hicks' testimony, found that no violation had been established. We find it unnecessary to reach this issue since the finding of such an additional violation would be cumulative and would not materially affect our Order.

We adopt the Administrative Law Judge's conclusion that Miller did not threaten employee Mihuc in violation of Sec. 8(a)(1) of the Act by stating that Respondent was going to close the plant during the winter and that Miller and Respondent's president, Newman, were going to go to Florida. In so doing, however, we disavow the Administrative Law Judge's finding that Miller's words were not meant seriously. Rather,

(Continued on following page)

of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

[3] 1. The General Counsel excepts to the Administrative Law Judge's failure to find that Respondent additionally violated Section 8(a)(1) of the Act when, on November 13, 1976, Respondent's president, Newman, interrogated employee Phyllis Hicks regarding her willingness to cross the picket line in the event of a strike, and in the same conversation told Hicks that if they did not have the Union he could afford to pay some of them better wages. We find merit in this exception.

The Administrative Law Judge correctly stated that the standard to be applied in determining the lawfulness of Newman's conduct is that applied in *Mosher Steel Company*, 220 NLRB 336 (1975). Thus, questions about employee strike intentions which are not accompanied by threats, promises, or other coercive conduct are not *per se* unlawful, but must be judged in light of all of the relevant circumstances. We find that Newman's questioning of Hicks, occurring in the context of his statement that if they did not have the Union he could afford to pay some employees better wages, exceeded the bounds set forth in *Mosher Steel*, and that Respondent, by Newman's conduct, violated Section 8(a)(1) of the Act. We shall amend the Administrative Law Judge's Conclusions of Law and recommended Order accordingly.

Footnote continued—

we find, in agreement with the Administrative Law Judge, that in the context in which it was made the statement did not constitute a threat.

In view of the Administrative Law Judge's conclusion, which we adopt, that employee Holibaugh was not discharged in violation of Sec. 8(a)(3) of the Act, we find it unnecessary to pass on the Administrative Law Judge's statement that, even had the discharge been unlawful, the strike would not have been an unfair labor practice strike.

2. We also find merit in the General Counsel's exception to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(3) and (1) of the Act when, following the [4] strike, it denied reinstatement to probationary employees Dale Thomas and John Carpenter.

It is well established that an economic striker who has not been permanently replaced is entitled to reinstatement upon making an unconditional offer to return to work, absent a showing by the employer that its refusal to offer reinstatement was based on legitimate and substantial business justifications.[3] Further, the denial of reinstatement to an economic striker, absent legitimate business reasons, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.[4] We find that Respondent has not met its burden here. Thus, there is no evidence that either Thomas or Carpenter was ever warned or otherwise advised prior to the strike that his work was unsatisfactory. Indeed, the only evidence regarding Respondent's decision not to offer them reinstatement is Supervisor Lascelles' self-serving testimony that *after the strike* he asked Thomas' and Carpenter's foreman about their work and was told that it had been poor. It is therefore clear that Respondent has not demonstrated that Thomas and Carpenter in any event would have been discharged prior to the unconditional offer to return,[5] or that its refusal to offer them reinstatement was otherwise justified by substantial and legitimate business [5] reasons. Accord-

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3. *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

4. *The Laidlaw Corporation, supra*, and cases cited therein at 1369.

5. *Markle Manufacturing Company*, 239 NLRB 1142, 1149 (1979).

ingly, we find that, by its conduct, Respondent violated Section 8(a)(3) and (1) of the Act.

Amended Conclusions of Law

Insert the following as new Conclusions of Law 7(d) and 8 and renumber the subsequent paragraph accordingly:

"(d) Coercively interrogating employee Phyllis Hicks regarding her willingness to cross the picket line in the event of a strike.

"8. By discriminatorily failing and refusing to reinstate economic strikers John Carpenter and Dale Thomas upon their unconditional offer to return to work, Respondent has violated Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mobile Home Estates, Inc., Bryan, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as new paragraphs 1(f) and (g) and reletter the subsequent paragraph accordingly:

"(f) Coercively interrogating employees regarding their willingness to cross a picket line in the event of a strike and informing employees that if they did not have the Union, Respondent could afford to pay some of them better wages.

[6] "(g) Discriminatorily refusing to reinstate, upon their unconditional offer to return to work, employees who participate in an economic strike."

2. Insert the following as a new paragraph 2(c) and reletter the subsequent paragraphs accordingly:[6]

"(c) Offer John Carpenter and Dale Thomas immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings suffered by reason of the discrimination against them, with interest, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)."

[7] 3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. February 4, 1982

JOHN H. FANNING,
Member
HOWARD JENKINS, JR.,
Member
DON A. ZIMMERMAN,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

6. Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

"APPENDIX"
NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights.

WE WILL NOT refuse to recognize, meet, or bargain with International Union, Allied Industrial Workers, AFL-CIO, and its Local 712, as the exclusive bargaining representative of our employees in the following unit:

All production and maintenance employees at Respondent's Bryan, Ohio, place of business, but excluding plant clerical employees, office clerical employees,

road service employees, truck drivers, and guards and supervisors as defined in the Act.

WE WILL NOT tell employees that their Union is no good and costs them money and they should resign from it and form their own union.

WE WILL NOT urge employees not to engage in a strike and not to support their Union.

WE WILL NOT coercively interrogate employees regarding their willingness to cross a picket line in the event of a strike.

WE WILL NOT discriminatorily fail or refuse to reinstate, upon their unconditional offer to return to work, employees who participated in an economic strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the abovenamed Union as the exclusive representative of all employees in the bargaining unit described above, and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL provide the Union with the information it requested in its December 10, 1976, letter and with any similar information it may request.

WE WILL offer our employees John Carpenter and Dale Thomas immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, and WE WILL make each of them whole

for any loss of earnings they may have suffered by reason of our discrimination against them, with interest.

MOBILE HOME ESTATES, INC.
(*Employer*)

Dated ..... By .....
(*Representative*) (*Title*)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 E. 9th St., Room 1695, Cleveland, Ohio 44199, Telephone 216-522-3126.

DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

(Dated March 16, 1981)

Case 8-CA-10691

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MOBILE HOME ESTATES, INC.

and

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS, AFL-CIO, and its LOCAL 712

FRANK MOTIL, ESQ., ROBERT WEISMAN, ESQ., and ROBERT L. BURCH, ESQ., of Cleveland, Ohio, counsel for the General Counsel.

DONALD M. MEWHORT, JR., ESQ., of SHUMAKER, LOOP & KENDRICK, of Toledo, Ohio, for Respondent.

ROY A. CAMPBELL, REG. REP., for Charging Party.

DECISION

Statement of the Case

JOHN M. DYER, *Administrative Law Judge*: Following the issuance of an Order by the National Labor Relations Board, herein referred to as the Board, remanding this case to the Administrative Law Judge who originally heard the proceeding and his becoming unavailable, the parties here-

to, Mobile Home Estates, Inc., herein referred to as the Company or Respondent, International Union, Allied Industrial Workers, AFL-CIO, and its Local 712, herein referred to as the International and the Local and collectively as the Union, and the counsel for the General Counsel, herein referred to as the General Counsel, expressed their desires on how to proceed to the Board, and it issued an Order remanding the proceeding to the Regional Director for a hearing *de novo*. Following the issuance of a Notice of Hearing by the Acting Regional Director on July 2, 1980, the parties stipulated that this case could be referred to an Administrative Law Judge for issuance of an original and independent Decision based on that Judge's own analysis, review, findings and conclusions in this matter, and not adopting or relying on the findings and conclusions in the Decision of the prior Judge. Following an agreed motion and stipulation to the Board, it issued an Order on September 18, 1980, granting the Motion, approving the parties' stipulation and ordering the Chief Administrative Law Judge to designate an Administrative Law Judge for the purpose of issuing and serving upon the parties a written decision on the record containing findings of fact, specific resolutions on the credibility of the testimony of witnesses, conclusions of law, and recommendations. [2] The Chief Administrative Law Judge appointed the undersigned who, with the agreement of the parties, set a date for receipt of their briefs in this matter. Briefs received from the Respondent and General Counsel have been studied and considered, together with the record and exhibits.

The Complaint, as amended, sets forth the jurisdiction and commerce allegations and the status of the Union, all of which are admitted. Respondent admitted the supervisory status of Company President James Newman, Director of Marketing Steve Miller, Plant Manager Clarence Brannun and Plant Superintendent Lascelles. Respondent

admitted that it had recognized the International as the bargaining representative of a production and maintenance unit at Respondent's Bryan, Ohio, place of business in March 1972 and signed a 3-year contract with the Union which was in effect from November 13, 1973, through November 14, 1976. Respondent denied that the Union represented a majority of its unit employees until the date of its Answer, but admitted that the Union had requested negotiation and collective bargaining with it up through December 10, 1976.[1] It admitted that certain employees struck Respondent from November 20 until December 1 and that the Union notified Respondent the strike was terminated as of December 1, and made an unconditional offer to return to work on behalf of the employees engaged in the strike. Respondent admitted it terminated Harry Holibaugh on November 18 and had not reinstated him, and that the Union on December 10 had requested of it the names and addresses of all bargaining unit employees and it had not honored that request.

Complaint paragraphs 12 through 37, as amended, contain allegations that Respondent violated Section 8(a)(1) of the Act by various interrogations, refusals to consider the Union's wage demands and threats to close the plant, conducting direct negotiations with employees, suggesting the formation of a separate union and seeking resignations from the Union. Many of these paragraphs are nearly identical in language with the exception of a date. Unfortunately, General Counsel's brief does not designate which testimony he contends supports the individual paragraph allegations, and I have made assumptions that certain testimony was meant to substantiate certain items in the Complaint.

---

1. Unless otherwise specified, all dates herein refer to the fall and winter of 1976 and the first few months of 1977.

The Complaint also alleges that Respondent violated Section 8(a)(5) by unilaterally instituting pay raises and increasing the existing piece rate and bonus without notifying and bargaining with the Union, and that Respondent engaged in a course of bad-faith bargaining. It is further alleged that the strike was an unfair labor practice strike and that Respondent did not reinstate 12 named individuals at the conclusion of the strike and laid off or terminated some of them because they had engaged in a protected strike, in violation of Sections 8(3) and (1) of the Act. A separate refusal to bargain is alleged in regard to Respondent's refusal to provide the information requested by the Union in its letter of December 10.

[3] Respondent denied that it violated the Act in any manner. Specifically it states it had good reason to believe that the Union no longer enjoyed the majority support of the unit employees following the conclusion of the strike and at that time it determined not to further recognize or bargain with the Union. It denied that the strike was an unfair labor practice strike but urges its inception was economic and that it had reached an impasse with the Union in regard to pay matters and that when it granted certain raises which it had offered to the Union during negotiations, it was completely within its rights.

In essence, Respondent admits that when the strike became imminent, it sought information from employees as to whether they would cross the picket line and work since it had decided to stay open during the strike and needed information to determine whether that course of action was feasible. Respondent also admits that, when asked by the employees what wage rates it would pay during the strike, it informed the employees that it would pay the rates it had offered to the Union.

Respondent offered various defenses regarding the 12 employees who were not immediately reinstated. According to it, some of those people quit prior to the strike and some were probationary employees who were not brought back since it determined they would not make good employees. Others were brought back shortly after the strike and some were recalled later, primarily because they were not needed since Respondent's business was down. Although Respondent hired five or six employees before it brought some of those alleged as discriminatees back, it stated that those hired were needed for particular jobs which those strikers were unable to perform. Respondent stated it terminated Holibaugh because he slowed down on the job and refused to perform and denied his union activity influenced its decision. Respondent offered various explanations for other allegations and denied it had performed certain actions.

In determining credibility where there are conflicts between witnesses, I have credited Belknap only in areas where he is corroborated by other individuals or testified to an event similar to other credited testimony. Some of Belknap's testimony went considerably further than other General Counsel witnesses and appeared to me to be embellishments on fact or his conclusions rather than direct reporting of events. In deciding to credit Belknap only partially, I noted his denial of a prior felony conviction and am not convinced by his explanation of that testimony. Belknap's rebuttal denial that Lascelles was a supervisor and "in fact I never seen Ron Lascelles or ever heard of him until I went back to work," meaning following the strike is incomprehensible when compared to his previous testimony that Lascelles was one of the foremen of the Company and that he had heard Lascelles ask Holibaugh to perform certain work. It appears that

Belknap completely disregarded his prior testimony in trying to make a point during his rebuttal testimony. Taking all of these matters together, I have concluded that Belknap's testimony is not reliable unless in the circumstances cited above.

[4] I have not credited Holibaugh completely since there were times during his testimony when he seemed to be evasive, and I believe the testimony preponderates against him in regard to his statements about overtime, both for himself and others and whether he urged slowdowns.

Some of General Counsel's witnesses who worked during the strike appeared to favor Respondent's version of events and appeared more friendly to Respondent than the Union or General Counsel. Where they testified to what President Newman or other supervisors said which might be considered violative of Section 8(a)(1), I have credited that testimony. A number of witnesses did not recall events and where opposing witnesses were able to cite what took place and give details, the opposing witnesses have been credited.

In applying Board law to the facts which I hereafter find, I have concluded that Respondent did not engage in a course of conduct, refusal to bargain, which was alleged as violative of Section 8(a)(5) of the Act. I did find that Respondent did not have sufficient reason to decide that the Union no longer represented a majority of its employees and that Respondent violated Section 8(a)(5) of the Act in refusing to recognize the Union as the representative of its unit employees and negotiate with the Union following the strike, and further violated Section 8(a)(5) in refusing to give the information the Union requested in its December 10 letter. I have also determined that Respondent, through President Newman,

violated Section 8(a)(1) of the Act when he told certain employees who had said they would work during the strike, that they could form their own union. It was also found that Director of Marketing Miller violated Section 8(a)(1) of the Act in his conversation with employee Mihuc.

I have found that the strike was an economic strike and that the parties were at impasse over wage rates and that Respondent's paying the rates and amounts which were the same or less than what it had offered to the Union during negotiations was proper and that it did not violate the Act by telling employees who stated they intended to work during the strike that it was going to pay such amounts. Since Respondent had decided it wished to run the Company during the strike and the strike appeared imminent after the last bargaining session, inquiries made of employees as to whether they intended to work during the strike were proper under Board law. Where questions were asked by employees in regard to the possibility of being fined by the Union, I do not find that the answer given by Newman that the employees could resign from the Union to forestall such action violated the Act, nor do I find that Respondent initiated or sponsored the document begun by employee Piper for resignations from the Union.

On the basis of the evidence, I have concluded that Holibaugh was not discharged in violation of the Act. Respondent's explanations for its recall or nonrecall of the 12 named individuals, one of whom General Counsel agreed to exclude and drop from the Complaint, I find have not been rebutted by General Counsel and have determined Respondent did not violate that allegation of the Complaint.

[5] Insofar as the record shows, all parties were afforded full opportunity to appear, to examine and cross-examine witnesses and to argue orally at the hearing held in this case.

On the entire record in this case, including the exhibits and testimony, and noting the contradictions in the testimony, and on the credibility resolutions I have made, I make the following:

Findings of Fact

I. Commerce Findings and Union Status

Respondent is an Ohio corporation with its plant and office in Bryan, Ohio, where it engaged in the manufacture and nonretail sale of mobile homes. During the 1976-1977 period Respondent annually purchased and received, directly from points outside of Ohio, goods and materials valued in excess of $50,000.

Respondent admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

Respondent admits, and I find, that International Union, Allied Industrial Workers, AFL-CIO, and its Local 712, are labor organizations within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Background and Undisputed Facts*

Most of the allegations in the Complaint concerned Company President James Newman who, together with his wife and daughters, owned and controlled the Company. Newman testified that he was the principal designer of the mobile homes his Company built and, to a large extent, designed and built the building used by the corporation. The original Complaint alleged that Steve Miller occupied the position of "supervisor" and was an agent of the Respondent acting in its behalf and a supervisor within the

meaning of the Act. Respondent's answer to the Complaint admitted the allegation of the Complaint, except it denied that Miller occupied that position. Miller's position, according to Respondent, is that of director of marketing. In regard to the 8(a)(1) Complaint allegation about Miller, Respondent took the position that Miller was not a supervisor of the employees in the unit, but that his capacity was head of sales and directing salesmen, and denied that he had been made a supervisor for a day over the employees in the P and M unit. From the admissions and from the testimony, it is clear that Miller is a supervisor in the sales department as director of marketing, and whether he had direct supervision or not over the P and M unit employees for a short time is immaterial since he is still a supervisor acting in Respondent's behalf and speaks for the Company in his capacity. Therefore, Respondent is responsible for the remarks I found he made.

[6] The sales department inspected finished trailers to determine that they met Company product standards before accepting them for delivery to customers. Miller and other salesmen would examine mobile homes and mark a "squawk sheet" identifying needed repairs or work. If minor matters were involved, such as puttying over nail holes or removing excess putty, etc., the salesmen or Miller might effect the repair.

Under Newman were Plant Manager Clarence Brannun and Plant Superintendent Ron Lascelles. Respondent in its 10 or 11 departments had senior employees who were designated as group leaders and were paid 10 percent more than regular employees for their work. The parties appear to have agreed that they were not supervisors. According to Respondent, its operation was cut up into a number of subdivisions and there might or might not be a group leader in each of these subdivisions.

Respondent built both single and double-wide homes which would start their journey through the plant at the first station where the frame was placed, followed at other stations by the floor, then the walls and various work done at the stations until the product was ready to be rolled out of the plant at the last station and placed in the yard. Sometimes final finishing touches or repairs were needed after the product left the plant, while it was in the yard.

Respondent did not produce products for inventory but built only for a confirmed order which it tried to fill in 3 weeks.

During the fall of 1976, Respondent had 40 P and M unit employees according to the available exhibits, and they were producing around three single homes a day. Newman said he sought to produce a floor, that is one single-wide product or half of a double-wide home, with the expenditure of 120 man-hours or less.

During the fall Respondent received an order for six double-wide units, which were to be fancier and better finished than its regular products and consequently took more time to complete. But since 12 floors would be only a small percentage of Respondent's production of 3 floors a day over a 2 or 3-month period, this order would not explain the slowdown in production Respondent testified it experienced.

The plant is partially open and apparently it is rather difficult to work in some parts of the plant during cold weather. Respondent stated that usually the winter season brings a slump in orders and for the two winters prior to the 1976-1977 period it had closed its plant completely except for a few personnel.

Respondent stated that its orders were low in the winter of 1976-1977 and it did not need to replace all of its employees and return to its pre-strike complement for that reason and because it sent some employees to prepare and show its product at an annual mobile home show in Louisville, Kentucky, and these employees were gone for several weeks.

[7] The 3-year contract between Respondent and the Union, among other things, contained a checkoff authorization clause and a provision that the employees in the unit were to become members of the Union after 30 days' employment. The contract also provided for a 45 working day probationary period for all employees and contained a clause that either party had to give the other 5 days' notice if it wished to terminate the contract.

Respondent claimed that initially it did not deduct dues since authorization cards were not provided for a period of more than a year after the contract commenced. Eventually dues authorization cards were provided and the employees signed them and dues and initiation fees were thereafter deducted from employees and forwarded on a monthly basis to the Union.

The employees belonged to an amalgamated local union which had its offices elsewhere than Bryan, Ohio. During the summer of 1976, there was a renewed interest in the Union and regular monthly meetings of Respondent's employees began to be held. The members sought their own local union, petitioned for it, and it was granted by the International. An election was held in August and officers, a bargaining committee, and stewards were elected. William Hamilton was elected president, Harry Holibaugh, vice president, Phyllis Hicks was elected secretary and became the treasurer after the strike commenced following Denny Sanders' resignation from the

Union. Employees Piper, Eddy, Paxton, Sheets and McCloud were trustees.

Respondent and the Union entered into negotiations for the renewal of the contract in October and met on five separate occasions, the last date being Friday, November 12.

Among the objects which the Union sought were a minimum wage scale of $5 per hour and the elimination or some modification of compulsory overtime. The Company had proposed a wage scale less than what the Union sought and suggested a new pot bonus system which would pay employees, after deducting labor and other costs, 7 1/2 percent of the inventory price of the finished product. It was agreed by Union Representative Campbell during his testimony that the 7 1/2 percent pot bonus figure would be in excess of 10 percent of the employees' wage rates.

At the November 12 negotiation meeting, the parties went through various proposals. Some agreements were made but the main sticking point was wages. After receiving a different proposal from the Company and the Union's rejecting it, the parties left the meeting room. They met outside on the street, conferred further, went back inside and met again, secured agreement on a few other items, and Respondent revised its wage rates to a base in the first year of the contract of $3.65 per hour, with $3.85 for employees with 6 months' seniority, and $4.10 an hour for employees employed longer than a year. Raises for the second and third year appear to average somewhere around 7 to 8 percent. The union negotiating committee again rejected Respondent's offer as insufficient but said it would take it to a meeting of the employees, although recommending against it, and that the meeting would be held on Sunday, November 14.

[8] There were 32 employees at the union meeting on Sunday, November 14, and they rejected Respondent's final contract proposal by 31 to 1. A vote was then taken on whether to strike and the result was 28 for striking, 2 against, and 2 void.

A notice reciting the rejection of the Company's offer and terminating the contract signed by Roy Campbell was delivered to Newman at home by Holibaugh, Belknap and Eddy who told Newman, when he asked, that the action meant the employees would strike as of midnight November 19-20.

Holibaugh was terminated on Thursday, November 18. A picket line was established at the Company's premises shortly after midnight on Saturday, November 20. It appears that some 13 people who were on dues authorization prior to the strike signed a document resigning from the Union, and most of them worked during the strike. The number of employees who picketed dwindled during the strike and some of the employees who stayed out and did not work did not picket.

The picketing employees held a meeting in the evening of December 1 and decided to terminate the strike. Union Representative Campbell informed his superior of the vote, and his superior said he would notify the Company by letter. Some of the picketing employees returned to work the following day. A letter from the Union, dated December 1, making an unconditional offer on behalf of all striking employees to return to work was received by the Company between December 2 and December 3. According to the Complaint and amended Complaints, the 12 people listed in paragraph 39 were not returned to work then and some were never asked to return to work.

On December 10, Union Representative Campbell sent a letter to President Newman requesting a list of all em-

ployees with their dates of hire, addresses, rates of pay and the department in which they were working. The letter also requested the continuation of dues deductions and stated that the Union was prepared to resume contract negotiations on December 21, 22 or 23. Newman's return letter, dated December 14, stated that according to the contract and Respondent's attorney the Company could not deduct dues from the employees but enclosed a list showing the amounts deducted from employees for November. Campbell responded on December 17, saying Newman had not answered his request for further negotiations and the information sought in his previous letter. On the same date Respondent's counsel wrote Campbell, saying that because of previous commitments he would be unable to meet on the negotiation dates proposed by the Union and suggested that the Union call him after the first of the year to make arrangements for a negotiation date. He stated that the checkoff authorizations expired with the termination of the contract and Respondent would not deduct dues from any of its employees' wages.

There were no further negotiation meetings between the parties, with neither of the parties seeking to get in touch with the other and the Union filing the initial charge in this case on December 27.

[9] B. *Events Prior to the Strike*

1. Phyllis Hicks was one of the most senior employees at Respondent and built cabinets for installation in trailers. In August 1976, she was elected recording secretary and was a member of the negotiation committee, participating in the five negotiation sessions. During the strike she became the treasurer when the Union replaced members and officers who had resigned from the Union. She testified that after either the second or third negotiation ses-

sion in late October, while she was in the cabinet shop, Newman said he had offered a fair contract. She said, she did not think it was fair because the wages were not much different from those in the prior contract. Newman said he could not afford to pay $5 an hour (base salary) but would have to close his doors because he would go bankrupt. Hicks was asked to name the members of the negotiation committee, did so, and then was asked if they were present during this conversation, and the transcript shows she said yes. This answer would certainly nullify the allegation.

Hicks testified that on Saturday, November 13, while in the cabinet shop, Newman asked if she would cross the picket line if there was a strike. She said she would but would not bring her car across the picket line and Newman responded that either he or one of the supervisors could bring her through the picket line. She testified Newman said if they did not have the Union he could afford to pay some of them better wages.

She had another conversation with Newman later on the same day in uptown Edgerton, Ohio, in which she again told Newman she would cross the picket line. He said the Company had offered a just and fair contract and they would bring her across the picket line. She stated that Newman said she would have to withdraw from the Union so she would not be fined.

On the following Monday, she saw Newman near the cabinet shop and told him she would not cross the picket line. He told her he would bring her across the picket line, but she repeated she would not cross it.

Newman testified he decided to try to keep the plant open for work in the event the employees struck and he attempted to determine whether enough employees would

cross a picket line to make his decision feasible. He agreed that he and Phyllis Hicks talked on and off about the strike for a couple of weeks prior to it and that she told him she wanted to work and he told her he would help her come across the picket line. Newman also stated that some of the employees told him they were afraid to work during the strike because they had been told they would be fined $500 by the Union if they did so. **[10]** He said he asked his counsel about it and was told that employees could not be fined if they were not members of the Union and he in turn gave this information to a number of the employees. Newman admitted he spoke to Phyllis Hicks about the negotiations and the amount of pay the Union was demanding and stated that what he said to her was the same thing he had said to the entire union negotiating team during negotiations, and Hicks said that was true. Newman said that on Monday Mrs. Hicks reversed herself and said she was not going to work during the strike and said she had received some threatening telephone calls and was worried.

Although stating at one point that she did not tell Newman on Monday, November 15, about being concerned because of threatening telephone calls, Hicks later said she might have discussed the subject with Newman and acknowledged that she did receive a telephone call and was afraid for her daughter.

The above testimony appears to relate to Complaint paragraphs 12 and 13. Complaint paragraph 12 alleges that Newman interrogated an employee regarding the employee's intention to cross the picket line on or about November 13.

It was apparent following the union committee's rejection of Respondent's contract offer on November 12 that the parties were headed for a strike. In these cir-

cumstances and considering both Newman's question to Hicks and his later questions to other employees in the following week as to whether they would work during the strike, it appears that *Mosher Steel,* 220 NLRB 536, controls the situation rather than *Schaeffer Pen,* 199 NLRB 242. The Board has held that inquiries of employees as to their strike intentions are not *per se* unlawful where the record shows there is a reasonable basis for fearing a strike and respondent seeks information on which to determine whether it can keep its business open during the strike. One caveat is whether such inquiries are coupled with threats or promises. I find that the discussions between Newman and Hicks did not contain threats or promises and that these were questions asked by Newman to determine whether to attempt to keep his business open. I would therefore dismiss Complaint allegation 12, finding that it is not substantiated.

Complaint allegation 13 alleges that Newman threatened an employee with plant closure rather than "—reasonably considering the Union's wage demands, in order to discourage employees from engaging in a protected strike." Hick's testimony was that Newman said he could not pay $5 an hour and would have to close his plant doors because he would go bankrupt.

Prior to this time, Respondent and the Union had engaged in five negotiation sessions and Respondent had made three different wage proposals, altering its proposal a second time during the last negotiation session. It is clear that Respondent did consider the Union's wage proposal, made several counterproposals and rejected the Union's proposal on the ground it could not afford it.

[11] There is nothing in Hicks' testimony that would show Respondent did not reasonably consider the Union's wage demands, and the General Counsel has not demon-

strated by any other evidence that Respondent did not "reasonably consider" the Union's position. The lines on pay were drawn sharply with the Union proposing and not backing away or compromising on its $5 position.

The fact that Respondent did not accept the Union's position but argued that having a basic rate that high would bankrupt it is not any proof that Respondent did not consider the Union's position in a reasonable manner.

The testimony falls far short of supporting Complaint paragraph 13, and I find accordingly that this allegation must be dismissed.

Complaint paragraph 15 alleges that Newman on or about November 13 unlawfully suggested that an employee resign from the Union "—in order to avoid engaging in a protected strike and further, to avoid being fined by the Union for failure to engage in an authorized strike." The testimony of Hicks was that Newman said she would have to withdraw from the Union so that she would not be fined after she told him that she would cross the picket line. Newman asserted in his testimony that his response to employees concerning fines was based on their questions to him concerning the issue. It is clear that Newman did not say anything to Hicks about resigning from the Union "—in order to avoid engaging in a protected strike—." The Board has found violations where an employer urged employees to resign from the Union in an effort to undermine union strength or undercut employee support of a strike. This was not the case here. The employee, known by the Company to be a union member and officer, had said she would cross the picket line and physically not support the strike, and the information was given to her on the basis of current rumors that union members who crossed the picket line would be fined $500.

In these circumstances, I would not find that Newman violated Section 8(a)(1) of the Act since the threat of fines was being bruited around and this information was given to an employee union member who said she would cross the picket line. There is no testimony that she did not ask Newman about the fines. Accordingly, Complaint paragraph 15 is dismissed.

2. Hicks testified that on either November 15 or 16, while in the cabinet shop, Steve Miller asked if she was going to cross the picket line if there was a strike and she told him that she would not cross the picket line.

General Counsel's brief states that employee Darlene Dangler corroborated that Miller approached Hicks. However, Dangler's testimony is only that she saw Hicks and Miller talking.

[12] Miller denied that he had any conversation with anyone in the cabinet shop and said that he had no conversation with Hicks.

Assuming, without deciding, that Hicks' testimony is correct, I would find it insufficient to support the Complaint allegation. There are no accompanying remarks which would threaten or promise anything to Hicks. The issue is whether this, by itself, is unlawful interrogation.

Miller, as the director of marketing and head of sales, had a direct interest in whether trailers were going to be manufactured and produced through an impending strike. Although Miller did not have Newman's responsibility in making the decision whether to operate during the strike, he was a supervisor who could report his findings to Newman. There appears to be no coercion extant or intended in this conversation, and I find that the testimony does not support the Complaint paragraph and that paragraph 17 must be dismissed.

3. Jan Piper, who had worked for the Company some 4 1/2 years and was the person with the most seniority, testified that between November 13 and 15 President Newman asked if he would work during the strike and he replied that he probably would.

Assuming that this testimony is meant to support Complaint paragraph 16, I find that it does not substantiate it and the Complaint paragraph must be dismissed.

As stated above, after negotiations had terminated and possibly after the employees had voted to strike, there was no question but what a strike was imminent, and Respondent, seeking to determine whether it would have enough employees to run the plant during the strike, asked some of its employees if they would work during the strike. This questioning in this manner and for this purpose was proper and not coercive interrogation. See *Mosher Steel, supra.* Therefore Complaint paragraph 16 must be dismissed.

4. Kenneth Brown testified that after the strike vote had been taken he asked if Newman was going to keep the plant open and Newman said yes, who is going to work? Brown said he talked to Newman about going to the Edgerton plant (Mini Mansions, a sister corporation) if Newman was not going to keep the Bryan plant open. Dennis Sanders testified that during the week of November 14 Newman asked if he was going to strike, and he said it looked like it and asked Newman if he could work if Newman was going to stay open. Newman said he was going to stay open and Sanders could work if he wanted to.

Presuming that the testimony of Brown and Sanders is meant to support Complaint paragraph 19, I find and conclude that these remarks and questions by New-

man were proper under these circumstances and accordingly will dismiss Complaint paragraph 19.

[13] 5. It is not known what evidence General Counsel would assert substantiates Complaint paragraph 20 which alleges that Newman interrogated an employee during the first 3 weeks of November regarding the employee's opinion as to whether employees would engage in a strike. If General Counsel was relying on the testimony of Phyllis Hicks or Kenneth Brown, and knowing of no other testimony which might be relevant, I do not feel that such testimony supports this Complaint paragraph and accordingly would dismiss paragraph 20.

6. General Counsel has not suggested what testimony substantiates Complaint paragraph 23. The only testimony which seems to come somewhere near the allegation that Newman interrogated an employee concerning the employee's knowledge of other employees' intentions of engaging in a strike would be Brown's testimony that after he asked if Newman was going to keep the plant open, Newman said, who is going to work? If this testimony is meant to substantiate Complaint paragraph 23, I find that it fails to do so. The context of the conversation would not permit such a strained interpretation. There being no other testimony which I can find which would substantiate this Complaint paragraph, I dismiss Complaint paragraph 23.

7. Complaint paragraph 18 alleges that Newman threatened employees during the week of November 14 that Respondent would close its plant rather than reasonably consider the Union's wage demand for the purpose of discouraging employees from engaging in a protected strike.

Nile Eddy, who had been with the Company a number of years, was a member and trustee of the Union and on

the bargaining committee. He attended three or four negotiation sessions, resigned from the Union prior to the strike and worked during the strike. At the time of the hearing in this case he was an assistant supervisor and was called by General Counsel as an adverse witness.

Eddy said he, along with others, rejected the Company's contract proposal and voted to strike and was one of the three who went to Newman's house to give him the message that the Union had rejected the Company's offer and voted to strike. During the week prior to the strike Eddy talked to Newman about the bargaining positions, stating that he thought what the Union asked for was fair and asked why Newman did not want to pay the $5 base rate. Newman said a lot of people in the factory were not doing their jobs and that he could not pay people who were lazy and stood around doing nothing. Eddy asked why they could not get rid of those people. Newman replied that if they could get rid of the people that did not want to work he could afford to pay a half way decent wage. During this conversation Newman asked if they were going to strike, and Eddy replied that they were not putting barrels out there for nothing. Eddy said that though he did not remember it precisely, it is possible Newman said if the employees went out on strike he would probably have to close the plant.

[14] Employee Anthony Paxton, who had been with the Company over 2 years at the time of the strike, said he told Newman while they were conversing in the plumbing department that he would strike for more benefits but not for more money. Newman said he could not pay $5 an hour, that he would close the plant down before he would pay that much because people were not doing their jobs and he would lose money. Paxton said he agreed with Newman that he would lose money at that rate.

There is no testimony or evidence that Respondent would not or did not reasonably consider the Union's wage demand, as noted *supra*. The statements in the context shown above, do not amount to a coercive threat to close the plant but rather appears to be a statement of what Newman felt might become necessary if the employees did not work during the strike or if Respondent had to pay a wage rate which it thought would drive it into bankruptcy. Again, presuming that Eddy's and Paxton's testimony are meant to substantiate Complaint paragraph 18, I find and conclude they do not do so and dismiss paragraph 18.

8. Employee Ernest Williams, who was a group leader, stated that on Thursday, November 18, Newman asked if he was going to work on Monday. He told Newman there was a strike vote and there would be a strike and he would be on the picket line.

Complaint paragraph 22 alleges that Newman interrogated an employee on or about November 19 regarding the employee's intention to engage in or refrain from engaging in a strike. Assuming that Williams' testimony is meant to substantiate Complaint paragraph 22, and/or Complaint paragraph 24 which is phrased precisely the same, I find that the testimony does not substantiate either paragraph and that they should be dismissed on the basis that questioning an employee as to his intention to engage or not engage in a strike where the strike is imminent and respondent is attempting to keep its plant open during the strike is not coercive or violative of the Act as per *Mosher Steel, supra,* and I dismiss Complaints paragraph 22 and 24.

9. Gary Woodall testified that on November 18 Newman asked what he thought about the whole matter pertaining to the strike and he replied that he did not

care and walked away. He said that Newman asked him this question two or three times that day.

Employee Robert Belknap testified he was asked by Newman in one part of their November 18 talk what he felt about the Union and he responded that it was good for both the Company and the employees. Newman said he meant concerning what they were negotiating for. Belknap replied that they were being fair in what they asked for, and Newman replied that they were not, that $5 an hour was not fair because it would break him and that a lot of the employees would slack off and not work if they were getting $5 an hour. Belknap said he replied, "You're the boss and you could weed out those people that won't work and get rid of them and get employees that will work." He said Newman asked what he thought about working under a gentleman's agreement and going nonunion if they went out on strike. He said he replied no, **[15]** that he had taken an oath when he joined the Union and felt obligated to the people he represented who had voted him in office. He said Newman said he would make it worth his while if he would stay and he replied no, he could not do it. Newman supposedly then said Belknap was not being fair, and he replied that he could not withdraw "like you want me to." The conversation turned to an injunction the Company was going to get, and Newman was asked whether he had shown Nile Eddy some cancelled orders and responded yes, because he could not fulfill the contracts. Belknap said he asked why Newman did not tell that to the entire committee. Newman supposedly responded he was glad that was brought up, that he could make it worthwhile if they withdrew from the Union and stayed in the shop and worked instead of going out on strike. He said he told Newman he could not do that

and Newman said they were not going to hurt him, he would have a new crew coming into the plant. He also stated that Newman said there would be a piece of paper coming around the shop for people to sign that would stay and work and if he changed his mind, the paper would be floating around.

Complaint paragraph 21 alleges that Newman unlawfully interrogated an employee regarding the employee's attitude towards the Union and the employee's position on the Union's bargaining demands. If Woodall's testimony is meant to substantiate this allegation, I find that it did not do so.

As stated *supra*, in view of Belknap's overall testimony and the attack on his credibility, I have determined not to credit Belknap in areas which are not corroborated by other employees or where there is no credible similar testimony. It appears that Belknap embellished his testimony since he retreated from it somewhat during cross-examination.

Newman testified that about 2 days prior to the strike he talked with Belknap concerning whether Belknap would work during the strike and Belknap said he would not and hoped there would not be any hard feelings. Belknap told him that one of the reasons was that the people had elected him and he felt an obligation since he was on the bargaining committee and was afraid of violence. Newman told Belknap there were no hard feelings. Belknap said Newman would not have the trouble if he paid $5 an hour. Newman replied he could not afford to. Newman denied saying anything about Belknap's membership in the Union or withdrawing or resigning from the Union. He also denied that he had a conversation with Belknap about working under a gentleman's agreement. He said he had mentioned those words when he had talked to

a group of employees in the sidewall department earlier that week. He stated that at that time Sanders, Paxton and six or eight other employees had asked if they could work during the strike and he told them that he was going to have the plant open and anybody that wanted to, could come in and work. They wanted to know whether they would be under a contract and he replied no, but they could have a gentleman's agreement between them. Newman denied stating anything to Belknap about a paper going around, saying he did not know anything about any paper until Piper showed him a paper in the lunchroom the day prior to the strike.

[16] As between Belknap and Newman, I credit Newman's version of the events. It appears from the transcript that Newman had a good grasp of the facts and was able to detail what occurred, when, and who was present. Belknap's testimony seemed to be hazy in comparison.

Insofar as Complaint paragraph 21 is concerned, I credit Newman's version of the conversation and find that Newman was asked by Belknap what he was going to do during the strike and replied that he was going to get some new people if they went out on strike, and that they had a conversation concerning whether Belknap would work during the strike. Accordingly I dismiss Complaint paragraph 21 as not being substantiated by the testimony of either Belknap or Woodall, or of Holibaugh *infra* (12), and I do not find any other credible testimony which would tend to support this paragraph.

In regard to Complaint paragraph 36, which I assume is meant to be substantiated by Belknap, I find that Belknap's testimony does not substantiate it and that it must be dismissed.

Paragraph 36 alleges that Newman engaged in direct negotiations with employees and sought assistance of the

employees in undermining the Union and dissipating its majority status "—by coercively suggesting to them that they resign from the Union, draft and circulate a petition among employees for the purpose of soliciting resignation from the Union, form their own separate Union and enter into a separate 'gentleman's' agreement with Respondent governing the employees' terms and conditions of employment."

Belknap was the only witness of all of General Counsel's witnesses to suggest that Newman said there would be a paper going around the shop for people to sign who would stay in and work. I credit Newman's denial of having any such conversation with Belknap. Newman readily admitted using the term "gentleman's agreement" but stated that it did not occur in any single conversation with Belknap but was mentioned to a group of employees that he talked to in the sidewall department when they had asked if they could work during the strike and wanted to know if they would be under a contract. There is nothing to suggest in his answer that a "gentleman's agreement" meant that they were going to have a separate contract. Newman discussed with employees that he would pay them the amounts which he had offered to the Union during the negotiations. Since there is no reliable testimony to tell us what a "gentleman's agreement" would consist of, I can only assume that the language meant that he would agree to pay them the amounts which he stated and not otherwise alter their terms and conditions of employment, and to that extent that was an agreement between them but not a contract.

[17] There is nothing in Belknap's testimony concerning Newman's suggesting employees resign from the Union as such, other than the statement about a paper going around. Further, there is nothing which would

demonstrate that Newman suggested a paper be drafted and circulated to such purpose, and there is no testimony by Belknap that Newman suggested that the employees form their own separate union. Accordingly, on the basis of my credibility determinations and the lack of support for the allegation in Complaint paragraph 36, it must be dismissed.

Complaint paragraph 27 alleges that Newman engaged in direct negotiations with an employee "—by coercively informing the employee of Respondent's opinion of the Union's wage demands." Assuming that this allegation is meant to be substantiated by Belknap's testimony, I find that the testimony does not substantiate the allegation and am not completely clear that this allegation sets forth a violation of the Act, in that it is not clear what is meant by "coercively informing." In any event, I find that Complaint paragraph 27 is not substantiated by any credible evidence and must be dismissed.

Complaint paragraph 28 alleges that on or about November 18 Newman engaged in direct negotiations with an employee and promised a benefit by informing the employee Respondent would enter into a separate gentleman's agreement with him if he refrained from engaging in a protected strike.

Assuming that this Complaint allegation is meant to be substantiated by Belknap's testimony, I note again that I do not credit Belknap completely and do credit Newman's version of the conversation he had with Belknap. Noting again the reference to a gentleman's agreement, I find that this Complaint paragraph has not been substantiated by any credible testimony and it must be dismissed.

10. Charles Albertson, who had been with the Company approximately 4 months at the time of the strike, was a welder and a member of the Union. He testified

he had a conversation with Newman on the day before the strike in the frame shed in which Newman said he was not going to meet the Union's demands and was planning on taking a trip to Florida and closing the place down in December anyway. According to Albertson, Newman also said that while the employees were out on strike they would not be drawing any unemployment and they could starve as far as he was concerned.

Newman testified that on November 17, which was his birthday, he was in the frame shop with Steve Miller, Albertson and others, and someone said to Miller that they ought to go to Florida and Newman said the plant would be locked up for the winter anyway and he thought he would go down there and buy a condominium and, turning to Albertson, joked, "Why don't you come down and wash my car and mow my yard?"

[18] With the historical background that the plant had been closed during the two previous winters and here, a strike was imminent which might possibly close the plant depending on how many people came in to work, and these remarks being made in fun according to both Newman and Miller, I find that there is no violation of the Act as alleged in Complaint paragraph 26 because I do not find that these were threats of Respondent economic reprisals if the employees struck. I further find that there is no substantiation for the allegation that Respondent would not reasonably consider the Union's wage demands as explained *supra*.

Assuming again that Complaint paragraph 26 is meant to be substantiated by the testimony of Albertson, I find that it does not do so and accordingly will dismiss Complaint paragraph 26.

11. Complaint paragraph 14 asserts that on or about November 18 or 19 Respondent assisted employees in the

preparation of "a petition" setting forth union members' intentions to resign from the Union and allowed the petition to be circulated among its employees throughout its facility.

Jan Piper testified that he had a meeting with Newman and employees Sanders and Paxton in the office on either November 18 or 19. He testified that they went to the office to tell Newman they wanted to work during the strike because they needed the money. Newman said he was not allowed to negotiate with them. Piper, without attribution, said there was some talk about resigning from the Union and forming their own union and working under a gentleman's agreement where they would look out for each other, but was not sure that Newman said anything about resigning from the Union. Newman did say something about a gentleman's agreement but Piper could not define it. Piper said Newman might have talked about a 10-percent increase in piece work but was not sure. During the conversation Newman said he would not pay $5 an hour and did not care if they stayed out all winter.

In regard to a "petition" or document, Piper said that he and others in the plant were talking about the possibility of a $500 fine for working during the strike and that this conversation had been going on before they went in to see Newman and said this might have been brought up during the conversation with Newman.

It seems reasonable from what Newman testified to at various points that if asked concerning this, Newman would have replied that they could not be fined if they were not members of the Union.

Following the meeting with Newman, Piper went several offices away to Newman's secretary, Mrs. Ellis,

and asked her to type something for him. She agreed, and he dictated the following: "The following people do not wish to be represented by Roy Campbell or Local 712, Allied Industrial Workers of America:" The document contains a typewritten date which appears to be November 18, 1976, and a handwritten 9 over the 8. On the document itself, which is Respondent's Exhibit 2, **[19]** there are 13 purported signatures. It does not appear that any other employees were with Piper when Mrs. Ellis typed this paper and an envelope addressed to Union Representative Campbell. Piper said that Mrs. Ellis had typed other things for him and other employees on occasion. The postage on the envelope appears to be from a postage meter, and Piper testified that he asked someone in the office to put the postage on the envelope. Mrs. Ellis testified that the postage meter is not in her office and that she was not asked to place the postage on the envelope. She stated that if she had been asked, she would have charged Piper 13 cents for the postage.

Piper said he took the paper into the plant and gave it to some employees in his department who passed it around and eventually returned it to him, and he mailed it. He agreed that he may have flashed the document in front of Newman but did not think that Newman looked at it closely and that Newman did not ask to see it but that he showed it when he told Newman that 12 or 13 people would work during the strike.

Newman testified that Piper told him he wanted to work during the strike and that a number of others talked to him about resigning from the Union, including Paxton and Sanders. In regard to the document, he stated that Jan Piper showed it to him the day before the strike in the lunchroom and that he told Piper he did not want it. He testified that he had received advice from his counsel

that he should not get involved with anything like that if it went on. He said a copy of it was put in his mailbox on either Thursday or Friday prior to the strike and that it appeared about the same time a group came into his office and told him that they were going to work during the strike and that there were others who would work also.

Newman testified that approximately 2 weeks prior to the strike he was asked by Sanders and others about working during the strike and told them his attorney had said that if the employees were not members of the Union they could not be fined. Asked if he said anything to a person about not circulating a document when it was shown to him, he said that he did not know that it had been done or when. Newman admitted that on occasions prior to the strike he told some employees that he felt the Union's proposals were unreasonable. He said that a lot of employees had in their minds that they were going to get $5 an hour and that this was unreasionable to him and when he was asked by any of the employees about the negotiations and the amount of pay, he would respond that the Union's demand for that amount was unreasonable.

While the Complaint refers to a "petition," it is clear that there was no petition such as to sponsor a decertification or another union that was circulated insofar as this transcript shows. What General Counsel refers to as a "petition" is actually a statement of resignation from the Union which contains 13 purported signatures.

[20] Complaint paragraph 14 alleges that Respondent unlawfully assisted employees in the preparation of this document and knew of it and allowed it to be circulated among its employees in its plant during worktime. To support this allegation, it appears that General Counsel

assumes that Respondent had and enforced in its plant a no-solicitation rule. The transcript and exhibits do not demonstrate that Respondent had or enforced such a rule or that the circulation of a document during worktime was prohibited by Respondent.

Insofar as the testimony demonstrates, there was no participation by any members of management in the preparation or circulation of the document. The only management knowledge demonstrated by the testimony is that it was shown by Piper to Newman at lunchtime. There is no testimony that any supervisor knew or approved of the circulation of the document. Piper testified that originally he had the document prepared and gave it to others to circulate and that after others had signed it, it came back to him. Thus there is no evidence as to how many signatures were on it at the time it was shown to Newman. It is just as feasible that the document was completely signed by noontime when Newman saw it, as it is feasible that it was unsigned or partly signed. There is no way of charging Newman with foreknowledge of the circulation of the petition and no way to demonstrate that he knew the petition was circulated in the plant during worktime.

General Counsel has proved that a secretary for Respondent typed the two-line document on Company paper and addressed an envelope with the Union's address. It has not been proven who authorized the expenditure of 13 cents for postage for the envelope.

At best, we have ministerial clerical assistance from Respondent and nothing else proven in regard to the preparation and circulation of this document. On the status of the evidence, the allegations of Complaint paragraph 14 have not been substantiated, and I conclude that it must be dismissed.

12. Harry Holibaugh was a member of the negotiating committee both as the vice president and, after President Williams resigned, as the president of the Local. He testified that on November 18, the day he was discharged, while at work Newman asked what it would take to end the strike and he replied it would take what they asked for, $5 an hour. He said Newman replied he could not afford that and at that rate of pay some of the people would not have an incentive and would just goof off. Holibaugh responded that Newman would be surprised how well they would work if he paid them a decent wage. Newman asked again if it would take $5, and he replied yes and the conversation ended.

[21] Holibaugh, after first denying it, admitted on cross-examination that this conversation was practically the same as they had during various negotiation sessions. He agreed that Newman said if he paid $5 an hour as a minimum rate, there would be no way he could motivate the employees to work.

Newman testified that he had several conversations with Holibaugh concerning the status of the negotiations in the week prior to the strike. He asked Holibaugh if they would ever get things settled and Holibaugh said yes, if they got $5 an hour. He told Holibaugh he could not afford that and testified that this was the same thing they had been saying to one another during the negotiations. Holibaugh stated that maybe they could get some of the guys who did not want to work out of the plant but indicated the committee had to have $5 an hour to keep from striking.

It is not known if Holibaugh's testimony is meant to substantiate Complaint paragraph 21 which alleges that on November 18 Newman interrogated an employee regarding his attitude towards the Union and his position

on its bargaining demands. It is assumed that Holibaugh's testimony is meant to substantiate Complaint paragraph 33 which alleges that on November 18 Newman engaged in direct negotiations with an employee in the absence of the negotiating committee by seeking the employee's assistance in settling the strike. Complaint paragraph 34 alleges that during October and November Newman discussed piece rate and vacation pay proposals with an individual and thereby engaged in unlawful individual bargaining. It is not known whether Holibaugh's testimony is thought by General Counsel to substantiate Complaint paragraph 34.

Considering Complaint paragraphs 21 and 33 together, the evidence shows that on November 18, less than 48 hours before the strike was due to start, Newman was asking the president of the Union if the strike could be avoided and how. This question was not addressed to Holibaugh as an individual employee, but rather as the principal in-plant spokesman for the Union. If Holibaugh's answer had indicated a change in position, it is likely further negotiations would have ensued. However, his answer demonstrated that the Union was holding fast to the wage demands and was not prepared to compromise it at that juncture. Newman did not indicate his position would change and any prospects for a compromise faded. This conversation was not an effort to circumvent or subvert the Union but rather a question directed by Newman to the Union as to whether some movement could be made at this last minute to avert the strike. Whether the remark was made in a joking or a serious manner is immaterial. I do not find that Complaint paragraphs 21 or 33 are substantiated by the evidence. I know of no other testimony which would substantiate the allegations of Complaint paragraph 33 and accordingly dismiss it. Complaint paragraph 21 was considered *supra* (9).

[22] If Holibaugh's testimony is meant to substantiate Complaint allegation 34, I find that it does not do so for the reasons stated above. Further, there is no testimony that discussions between Newman and Holibaugh took place at any time other than the week immediately prior to the strike.

The next question is whether the testimony of Nile Eddy or Dennis Sanders substantiates paragraph 34. Eddy testified that he told Newman he thought the amount of money the Union asked for was fair. Eddy said he went to Newman's office to talk to him about the status of negotiations and wanted to know why Newman would not agree to the Union's demand. Newman said he could not afford a base rate of $5 when some of the employees would not work. There is nothing in Eddy's testimony about vacation pay. Eddy's testimony will be considered further in regard to Complaint paragraph 31 *infra*.

Sanders testified that during the week prior to the strike he and employees Kenny Brown, Leroy Stantz, Tom Farley and a few others were discussing what the base rate would be if they worked during the strike. Newman walked by and he asked Newman what the base rate would be if they worked during the strike. Newman said it would be $4.10 for the ones who were there a year, $3.65 for the ones under 6 months, and $3.85 for those between 6 months and a year. They also discussed that instead of the 7 1/2 percent pot bonus on the invoice price they would get a 10-percent wage bonus, which while a higher percentage would be less money than the Company's proposed pot bonus. There is no testimony that anything was said about vacation pay. Sanders' testimony will be considered further regarding Complaint paragraph 35.

I do not find that any of these conversations substantiate the allegations of Complaint paragraph 34 since the question concerning rates to be paid during the strike was a legitimate question and was asked by the employees of Newman, and Newman responded as both Eddy and Sanders testified. With the subsequent finding that an impasse concerning wages existed prior to the inception of this economic strike and Respondent was free to effectuate the amounts it had offered the Union, it is clear that this was not individual bargaining but an announcement of Respondent's plan. The alteration of the pot bonus was not unlawful, as will be discussed *infra*.

I do not find that either of these conversations violated Section 8(a)(1) of the Act and accordingly will dismiss Complaint allegation 34.

Sanders' testimony is assumed to relate to the allegation in Complaint paragraph 30 which alleges Newman unlawfully engaged in direct negotiations with employees by offering them Respondent's last wage proposal if they refrained from striking. The testimony does not substantiate this allegation since, as I will find *infra*, the parties were at an impasse over wages and Respondent, in attempting to work during the strike, could tell its employees what wages it would offer to employees who agreed to work during the strike. Therefore I will dismiss Complaint paragraph 30.

[23] 13. Complaint paragraph 32 is very similar to paragraph 30 in alleging that on November 19 Newman negotiated directly with employees by offering them the last wage proposal he had offered the Union in negotiations.

Assuming that Paxton's testimony is meant to substantiate this allegation, I find that it does not and that the paragraph must be dismissed.

Paxton, with fellow employees Beatty and Stantz, was in the plumbing shop on November 19, and they asked Newman if the pay rate during the strike would be the same or different from the rate of the old contract. Newman told them the rate for employees with a year's seniority would be $4.10 plus a 10 percent incentive.

This testimony is similar to that of Sanders in regard to Complaint paragraph 30 above, and for the same reasons as expressed for its dismissal, I will dismiss Complaint paragraph 32.

14. Pat Gentry testified that around November 17 while in the lunchroom, he had a conversation with Plant Superintendent Brannun and Director of Marketing Miller. Brannun wanted employees to stay and work overtime and threatened to fire them if they did not do so, and they were arguing back and forth. The question of the strike was brought up and, according to Gentry, Miller said he would pack up and go to Florida.

Complaint paragraph 25 states that Miller threatened employees on or about November 17 by coercively stating Respondent's intention to close the plant and go to Florida in order to discourage employees from engaging in a strike.

Assuming that Gentry's testimony is meant to substantiate Complaint paragraph 25, it does not do so since no threat was made and, according to the transcript, nothing was said about closing the plant. Miller's saying that he would pack up and go to Florida appears nothing more than a statement of what he would do if the plant was struck.

I conclude and find that Complaint paragraph 25 is not substantiated by evidence and will dismiss it.

15. Gwen Mihuc began her employment with Respondent in October 1976. She testified that while working in the final finish department on November 19, Foreman Lascelles told her that Steve Miller would be acting supervisor that day. She testified that later Miller said the Union was not any good, that the employees should quit it and start their own union because it was costing them money. She testified he said they were going to close the plant down and he and Newman were going to Florida and buying a condominium. Further, she stated Miller said there would be all new people working there in March and none of the people presently working would be there and Respondent had enough people to build trailers without them.

[24] During cross-examination Mihuc said she knew Miller, thought he was the head salesman, and had seen him inspecting trailers and doing some minor repair work. She stated Miller was perfectly serious in his conversation with her and that Miller started the conversation.

Lascelles denied telling Mihuc or anyone else that Miller was to be their foreman for a day. Lascelles stated that on November 19 some of the employees had come to work and then punched out early and he was shorthanded since Respondent was attempting to get as many trailers completed prior to the strike as it could. He asked Miller to stay in the finish department to make sure that things got done right and told those in final finish to do what Miller wanted to get the coaches properly prepared so they could get them out, but stated he did not tell the employees that Miller was their acting supervisor.

It would appear from what Lascelles admitted he told the employees, that some of them may have assumed Miller was their acting supervisor for that day. Whether he

was or not, there is no question but what Miller is a supervisor, as Respondent admitted, although he may not have had direct supervision over unit employees. Nevertheless, he is an agent for and speaks for the Company.

Miller recalled a discussion he had at about that time with employee Vicki Kreischer and stated Gwen Mihuc and several others were present. Kreischer said there were a lot of rumors going around concerning what might happen and she wanted to work but was afraid to do so and was going to stay home when the strike started. As to whether anything was said about Florida, Miller said he and Newman had a standing joke about going to Florida and getting a condominium for the wintertime. He said they all laughed about it, including Mihuc. Miller said Mihuc left shortly after that, saying she had a headache and there was a lot of pressure on her.

Respondent, in examining its witnesses accused of violations of Section 8(a)(1), in any number of instances drew direct denials of such testimony from them, in addition to their versions of the conversation. There is no denial from Miller of the direct statements Mihuc attributed to him concerning the Union being no good and the employees should quit it and form their own union because it was costing them money. Accordingly I find that Mihuc's testimony is undenied and have no reason not to credit her.

Accordingly I conclude and find that the allegations of Complaint paragraph 29, in regard to unlawfully encouraging an employee to refrain from engaging in a protected strike and from supporting or giving assistance to the Union for the purpose of undermining the Union and dissipating its majority status, and Complaint paragraph 37 alleging an attempt to undermine the Union by telling an employee to resign from the Union and form a separate union since it was no good and cost money are substan-

tiated by Mihuc's testimony. The testimony dealing with the statement about going to Florida and closing the plant [25] during the strike do not come within the ambit of a direct threat according to the bulk of the testimony regarding this statement. Accordingly I do not find that such a threat was made, but rather that the words were not meant seriously.

16. Complaint paragraph 31 alleges that Newman on two occasions engaged in direct negotiations with and coerced an employee, informing him that Respondent would pay the requested wage rate, despite the fact that it had been unwilling to pay the rate, if the employee would assist Respondent in undermining the Union and dissipating its majority status.

Presumably this allegation is meant to be substantiated by the testimony of Nile Eddy. As stated above, Eddy went to Newman's office and asked why Respondent could not pay the amount the Union was requesting. Newman replied that a number of people in the plant were not doing their jobs and were lazy and he could not afford to pay people like that if they were going to stand around and do nothing. Eddy testified he said, "Why can't we get rid of those people?" He said Newman replied that if they could get rid of the people that did not want to work, he could afford to pay a halfway decent wage. Eddy said he told Newman that Newman could weed out and get rid of the people that did not want to work and then Newman could afford the pay raise. Questioned closer by General Counsel concerning this statement, Eddy said that Newman said "Well, if we weeded out the bad guys, maybe I would pay the money, if we got the guys that didn't want to work."

The testimony does not substantiate the allegations of the Complaint. Apparently General Counsel felt that

"bad guys" referred to union members, but it is clear that the reference was to employees that Newman felt were not working. Eddy, at that time, was still a union member and a member of the negotiating team. The Complaint allegation appears to assert that Newman was attempting to enlist Eddy's aid to somehow help him get rid of union employees and, if successful in dislodging the Union, Newman would pay a $5 base rate. Eddy's testimony will not substantiate such a tortuous reading. The testimony appears to be a discussion between Eddy, a person interested in getting the Union's position across to Respondent that the employees wanted $5, and a response by Newman that he could not afford a base rate of $5 to employees who were not interested in working. The thrust of the conversation is not that Eddy would somehow get rid of the people or the Union, but that Newman should get rid of inefficient or lazy employees. Complaint paragraph 31 is dismissed since I conclude and find that it is not substantiated by any testimony.

[26] 17. Complaint paragraph 35(c) alleges that on November 18 Newman engaged in surveillance of union activities at an employee's home in Edgerton, Ohio. Phyllis Hicks testified that an impromptu union meeting of 10 or less employees was held at her home that evening following Holibaugh's discharge. During the time the employees were at her home, she saw a red and white Lincoln Continental driving past her house and testified that the only person she knows who owns such a vehicle is Newman. However, she could not see or identify the driver of the car nor the license plates of the vehicle. Later as she was preparing for bed, following the union meeting, she saw the car drive past her house again.

Newman testified that he was nowhere near Hicks' house that evening, that he had not known of any union

meeting and that he was home the entire evening because his family gave him a surprise birthday party. Newman said he had a friend who lives in the same community as Hicks, but denied that he had visited the friend that evening.

This allegation must be dismissed since, even crediting Hicks, there is no identification of person or vehicle but only of a red and white Continental. There is not even proof that there are no similar cars in the area.

Accordingly I dismiss Complaint paragraph 35(c).

18. Complaint paragraph 35(b) alleges that Newman attempted to seek assistance of employees in undermining the Union and dissipating the Union's majority status by telling them to resign from the Union.

Employee Paxton testified he asked Newman about union fines, saying he had heard that the Union would fine members $500 if they worked during the strike. Newman replied that the Union could not fine members who resigned from the Union and then worked during the strike.

Belknap testified that Newman told him to withdraw from the Union, but I do not credit this testimony since it is the only testimony attributing such a statement to Newman, and, on the credibility resolutions regarding Belknap, I would not credit such testimony. Further, Newman denied doing so.

Newman admitted telling employees who asked him, that they could escape from being fined by the Union if they resigned from the Union before working during a strike. He attributed this knowledge to his attorney's advice.

The testimony demonstrates that employees sought assistance from Newman in regard to the subject of fines and he answered their queries by telling them the Union could not fine them if they resigned from the Union prior to working during a strike.

[27] I do not find these statements to be coercive, but merely a response to employees who were concerned about a fine if they did work. While the employer may have been happy to give advice which encompassed resignations from the Union, his answers, based on his counsel's advice, to questions by employees how they could work during the strike without being fined by the Union, are not violative of Section 8(a)(1) of the Act, and accordingly I dismiss Complaint paragraph 35(b).

19. Complaint paragraph 35(a) alleges that Newman attempted to undermine and dissipate the Union's majority by suggesting to the employees that a separate union be formed.

Sanders testified that during their conversation Newman said the employees could form their own union. Similarly, Paxton testified that in his conversation on November 19, Newman said the employees could start their own union and have their representative in the plant.

Newman testified that during the week prior to the strike a number of people talked to him about union membership and fines, saying that they were afraid to work during the strike because Holibaugh was telling them they would be fined $500. He told them, according to his counsel, they could not be fined if they were not members of the Union and that a number of employees spoke to him about resigning from the Union. While denying any conversation with Belknap about withdrawing or resigning from the Union, Newman did not directly deny

this testimony of Sanders and Paxton. Newman was asked to deny quite a number of statements attributed to him and did so on a number of other occasions.

In this instance, I credit the testimony of Sanders and Paxton, who appeared to be, if not completely neutral witnesses, at least favoring the Company to some degree. They were employees of longstanding with the Company who had resigned from the Union to work during the strike. Their testimony appears to go against the Company in this instance, and I credit it and conclude and find that Newman suggested, at least to Sanders and Paxton, that the employees could start their own union in the plant after they had resigned from Respondent and that such statements violated Section 8(a)(1) of the Act.

In view of my finding *infra* that Respondent violated the Act by not continuing to recognize the Union, it is clear that Respondent was not free to do so and certainly was not free to encourage employees to start their own union, since Respondent had a duty to recognize the Charging Party and continue to negotiate and deal with it.

[28] C. *Background of Holibaugh's Termination*

Holibaugh started with the Company on May 12, 1976. He stated his job was to unload trucks and supply parts to the various departments as needed, and that he had been told by the person who had the job before him and showed him what to do, that was all the job required. He stated that prior to the commencement of negotiations he would unload trucks, empty wastebaskets, put out materials, and that he had volunteered to clean the lunchroom but that he very seldom moved trailers.

Holibaugh became a union member and participated in the August 25 election of officers and was chosen vice president and a member of the negotiating team. When the

president of the Union resigned in mid-October, Holibaugh became president of the Local.

Holibaugh testified that after he became a union officer, he was told that his duties also included cleaning the lunchroom and the men's room, cleaning up the yard and moving trailers, and cleaning wastebaskets in the sales department twice a day. The thrust of Holibaugh's testimony was that these duties were added to his ordinary duties following his becoming a union officer and concurrent with a change in attitude towards him by Supervisor Lascelles. He said that prior to that time Lascelles was friendly, but afterwards Lascelles' attitude became extremely hard towards him, particularly after he filed grievances against Lascelles. The first grievance he filed was for failure by Respondent to pay him holiday pay (apparently for Labor Day). His grievance alleged that he had worked the 8 hours before the holiday and 8 hours the following workday, but Holibaugh admitted he was late the day following the holiday and felt the withholding of holiday pay was erroneous. He agreed that when this grievance was presented, Lascelles told him to put it in, that he might win it.

Holibaugh testified that he prepared two grievances on the evening of October 20 and presented them to Lascelles the following morning. One of the grievances alleged that the Company was in violation of the contract by not posting job vacancies. The second grievance was a strong attack on Lascelles which alleged that Lascelles engaged in "— total and unnecessary harassment to employees, *continuous badgering* to work faster and harder, threatening to fire employees it caught out of department witch [sic] is depriving employees of bathroom rites [sic], threatening employees to work over 8 hours or they will be fired. *'Fits of anger'* unbecoming of a plant manager that suggest physical violence to employees."

[29] Holibaugh testified that Lascelles read the grievance and replied that he was going to give Holibaugh a warning. Holibaugh stated that one good turn deserved another, and Lascelles gave him a warning for not staying and unloading a truck. Holibaugh said he explained to Lascelles that he had washed, punched out, and was in his car getting ready to leave when the truck came in and nobody asked him to stay. Lascelles said that he should have come back, punched in and unloaded the truck.

Holibaugh acknowledged receiving another warning for not staying and unloading a truck, saying he had told Lascelles the day before that he could not stay overtime because he had to pick up his wife.

Respondent adduced testimony from employee Piper that he had held the job Holibaugh performed, prior to the time that the individual who trained Holibaugh was employed, and such person remained on the job a very short time. Piper testified that the normal duties of the job included working the towmotor, stocking the plant, unloading trucks, keeping the yard picked up, moving trailers, emptying wastebaskets, and cleaning bathrooms and the lunchroom.

Holibaugh admitted that when he received a raise in July, Lascelles said he expected a lot more from him and that he would be moving trailers off the end of the line. He said he told Lascelles he did not have enough time to do everything and Lascelles responded that he was sure Holibaugh would find the time.

When pressed on cross-examination as to when his relationship with Lascelles started to deteriorate, Holibaugh said that negotiations started around October 7 and by October 21 when he got that warning, the relationship had certainly changed. Asked if he recalled receiving

warnings prior to that time, Holibaugh said he did not recall receiving a written warning from Lascelles on August 27 for missing too much work but acknowledged his signature when shown the warning slip. Asked if he remembered another warning for missing too much work dated September 8, he said he did not recall receiving such from Lascelles. When shown the document, Holibaugh noted that there was no signature or union approval on it and said he did not recollect seeing it. He was asked if he had refused to sign any written warnings and replied that he had and acknowledged that there would be no signature with a refusal, but did not recall whether he refused to sign the document.

Holibaugh said he probably disagreed with all the warnings Lascelles gave and added that no excuse was good enough for Lascelles. When questioned as to whether he missed work during those periods, he replied that he had no idea. He was asked concerning other dates on which he allegedly missed work or was late and did not recollect any but said that there were a few mornings when he was late, and he did not remember when they were.

[30] In regard to working overtime to unload trucks, Holibaugh acknowledged that some trucks came from Indiana and, because of the time difference, did not arrive until late. He stated that sometimes he stayed overtime and sometimes he did not, that it depended on the plans he had, but said he never stated he refused to stay. Holibaugh said that if he had an important appointment or had to pick up his wife he would tell that to Lascelles, but added again that no excuse was ever good enough for Lascelles. Asked if he refused to stay on October 20, he said he did not refuse, but his testimony is unclear as to the reason he did not stay to unload a late truck on that date. The October 21 warning slip states that

"the employee refused to work over and stated that he will not work any time past 4 p.m. There are times when overtime is required." There is a purported signature of Niles Eddy and a written statement "but do not go along with it." Another warning slip dated October 29 signed by Lascelles has as its complaint: "Left when he knew truck was here to be unloaded. This must be stopped." There is a notation that Holibaugh refused to sign it.

There is agreement that during the negotiations the Union was attempting to secure the elimination of or restrictions on mandatory overtime. Holibaugh stated that after he became union president he proposed to the Company both inside and outside of negotiations that overtime should not be worked to get trailers completed. He admitted discussing this with other employees, stating that it was his opinion that a person did not have to stay and work 14 or 15 hours a day and have no life of his own. Asked if he had ever had to work 15 hours a day, he sidestepped the question by saying he would not do so. Asked if in the week before the strike he discussed not working any overtime with the employees, Holibaugh said a number of employees, including Schooley, Blankenship and others, asked if they had to work overtime and he said they could use their own discretion. Asked if he had told Lascelles that the employees did not have to work overtime, he first said he might have done so and then said he suggested it to Lascelles but Lascelles said that they had to work overtime when it was needed. He said there was one occasion when he told a group of employees in the lunchroom they could use their own discretion, and the employees decided not to work overtime.

Holibaugh was questioned about his second warning for not staying overtime to unload a truck (October 29) and was asked if he had not demanded of Lascelles that

he be given a 3-day layoff, as this was his third warning in a 90-day period. He said he did not do so in those terms but did ask whether Lascelles was going to give him 3 days off like he did everybody else on a third warning. He did not recall whether Lascelles said the warning was for corrective purposes and not for punishment.

[31] This acknowledgment by Holibaugh of one of the two overtime warnings as a third warning in a 90-day period, is a contradiction of Holibaugh's testimony that he did not recall the previous warnings for missing too much work in September and August. For this warning to have been his third, one of those prior warnings would have had to be included in the 90-day period.

Asked whether he complained to anybody else that he had not received a 3-day suspension, he answered that he did not recall. He denied saying that he would take the plant out if Respondent gave him a 3-day suspension. When questioned as to whether he complained to Plant Superintendent Brannun that Lascelles had not given him a 3-day suspension, he denied that, but did not deny talking to Lascelles about the suspension and stated that he might have done so.

Holibaugh was also asked about the Respondent's incentive pay system and replied that there was no incentive pay, there was only partiality and discrimination.

Ron Lascelles testified that the job for which Holibaugh was hired included receiving material, putting it away, keeping the yard in orderly fashion, supplying materials to the lines, emptying wastebaskets, cleaning the lunchroom and other rooms, and removing coaches from the line. Lascelles testified that Piper had held that job and for a period of some 4 to 6 weeks, a short-time em-

ployee held it between Piper's and Holibaugh's tenure. Lascelles testified that he talked to Holibaugh about Holibaugh's attendance problems, emphasizing that it was a small company and they did not have a lot of cross-training and everybody was needed to show up on time.

Lascelles also said he had discussions with Holibaugh concerning the need for employees to work overtime until the trailers were done and moved out of the plant. He told Holibaugh that materials come in from all over the country and there was no way for the truck-drivers to schedule themselves to be there precisely during worktime and sometimes it was required that a person stay late to do the unloading. Holibaugh said he did not want to work overtime and 1 or 2 weeks before the strike, Holibaugh said he was not going to work overtime any more, that his wife worked elsewhere, they only had one car, and he had to pick her up. Lascelles told Holibaugh that did not fit with the Company rules and there were occasions when overtime had to be worked. Holibaugh replied that Lascelles could not require him to work overtime.

In regard to October 21, Lascelles said he prepared the warning slip and gave it to Holibaugh before Holibaugh gave him the two grievances. When he gave Holibaugh the October 29 warning concerning not working overtime, Holibaugh said this was his third warning and asked if Lascelles was going to give him a 3-day suspension and added that if Lascelles did, he would take the shop out with him. **[32]** Lascelles said no, that it was a warning, not a discipline, and he wanted to make sure Holibaugh understood what the Company wanted from him, that they did not want to chase him off or cause problems, and therefore he was not giving him a suspension. Lascelles testified that Holibaugh argued he was supposed to

receive a suspension and after saying several times that he was not going to suspend him, Holibaugh said he would see about it and went to Brannun. Lascelles followed, and Holibaugh told Brannun that he had received three written warnings and was supposed to have 3 days off, that Lascelles had given him the third warning and did not suspend him and he wanted Brannun to override Lascelles. Brannun refused to do so.

Lascelles testified that Holibaugh's work got progressively worse and that when he would talk to Holibaugh about improving, Holibaugh would look at him and smile and say he was doing his best and that he interpreted this behavior as an attempt to needle him. Lascelles noted that during the week prior to the strike production slowed down, material was not being delivered to the areas and he saw Holibaugh around the shop talking to people, not doing his work.

D. *Holibaugh's Termination on November 18*

Holibaugh acknowledged that on November 18 he was late to work but said others were late as well, and he was the only one who received a warning. He did not testify as to whether the others had the same history of problems he had with lateness and absenteesim. He stated that during that day he was ordered over the loudspeaker system to go move trailers off the line and got the tractor, went to the end of the line, and spotted them in the yard. Thereafter he went back to his towmotor and found that Newman was using it loading cabinets. Newman asked where he had been, and he replied Newman ought to ask Lascelles, that he had been moving trailers off the line. Lacelles was present and said that Newman should have seen Holibaugh driving, that he did not think Holibaugh could drive any slower. Holibaugh asked if they wanted him to tear

the trailers up, and Newman told him that they were not going to take any more ---- off of him. Holibaugh asked, "Why don't you go ahead and do it?" and Newman said he was acting in a smart-aleck manner. Holibaugh said, "Why don't you go ahead and fire me, that's what you're up to anyhow." Lascelles said that they were not going to take any more ---- off of him, and Holibaugh replied that he did his job. Newman commented that if he did his job, why was it that several departments needed 1 x 4's and 1 x 2's. Holibaugh replied it was because they were not in stock.

Holibaugh said that following this, around noontime, Brannun said he was not supposed to be talking about union activities all over the plant. Holibaugh asked if they thought he was a robot, that if somebody talked to him he would reply.

[33] Around 3:40 p.m. while Holibaugh was moving a trailer off the end of the line, Lascelles got on the tractor with him. After he had positioned it in the yard, Lascelles said he thought Holibaugh was harassing him, that Holibaugh had a smart attitude and he thought Holibaugh had just better go home. Holibaugh asked if that meant he was fired, and Lascelles said it did. He punched out and left. Holibaugh complained that he was being paged for jobs all over the plant that day and felt he was being harassed.

Newman testified that on November 18, not finding Holibaugh around, he used the forklift to move some cabinets which were needed. When Holibaugh got back, he told Lascelles and Holibaugh that it was Lascelles' obligation to get Holibaugh straightened out. He told Holibaugh that they had taken all the ---- from him that they were going to take, and Holibaugh smiled in reply.

Lascelles said that 1 x 4's are the main item they use and while occasionally they might be out of some particular length of 1 x 4's, the Company would never be out of them entirely.

Lascelles testified that Holibaugh perceptibly slowed down on the job. On November 18, he paged Holibaugh over the intercom to come to move two coaches. After waiting for some time, he walked to the final finishing department, found Holibaugh and asked him to get his tractor and go to the end of the line and move two coaches. He returned to the end of the line and after waiting for a while, again went back to the final finishing department and told Holibaugh he was waiting for him to move. Holibaugh said he was coming. Lascelles walked back to the end of the line and arrived before Holibaugh showed up driving the tractor. He said he helped Holibaugh back up and hook up to the trailer and watched him move it into the yard. He testified that Holibaugh was moving as slow as it is possible to move and that it took forever for Holibaugh to move the trailer out and park it. When Holibaugh came back, he decided to talk with him about it and again helped him hook up. Lascelles rode on the back of the tractor and asked Holibaugh why the job was not getting done and why he was so slow. He said Holibaugh spoke about the strike and said that Lascelles had better watch out when the strike started because the big boys from the flooring department were going to bust some heads. He asked Holibaugh if that was a threat, and Holibaugh responded by asking "Did I threaten you?" and saying no, it was not a threat. He told Holibaugh he wanted him to get the work done so the line could move, and Holibaugh replied that he was not going to bust his fanny and smiled at him. He told Holibaugh that he might as well go home because he had to get the job done and had to have some-

one who was going to do it. Holibaugh smiled, said thank you and left.

In regard to the statement about the boys from flooring, Holibaugh said he did tell Lascelles they had some pretty big boys in the flooring department and when Lascelles asked what he meant by that, he replied he was just making conversation.

[34] While Holibaugh denied that he had ever refused to work overtime, it appears from his statements that although he might not have used those words, such was the clear import of what he said.

Respondent also accused Holibaugh of asking employees to slow down in their work during the week before the strike. Holibaugh denied making such statements. Employee Paxton stated that 1 to 3 days before the strike, Holibaugh told him not to build up the plumbing material ahead of time but to use up what they had built up so that when the strike started the Company would have to build it, and to slow down his work. Paxton also testified that he overheard a conversation between Holibaugh and Lascelles about 3 days prior to the strike in which Holibaugh said it was not his job to unload a trailer and he was not going to do it. Holibaugh denied making that statement.

E. *Conclusions as to Holibaugh's Termination*

If we consider Holibaugh's testimony and that of a few General Counsel witnesses, it would appear that a *prima facie* case is made out for Holibaugh in that he asserts he began to be harassed by Lascelles at the time he became a union officer and that the harassment continued and increased. His testimonial description of the discharge and the events leading up to it would show

that he was being continually harassed throughout that day by Lascelles and was trying to do his job and was terminated by Respondent without just cause to punish him for his union leadership. There is testimony that following his discharge some seven to eight employees gathered at Phyllis Hicks' house and talked about going out on strike early to protest Holibaugh's discharge but were dissuaded from doing so by Union Representative Campbell.

Overbalancing this picture is that which evolves from Respondent's testimony, some admissions from Holibaugh, and the warnings. The evidence is clear that Holibaugh had some problems with attendance and lateness and had been warned concerning them and from Holibaugh's admission, it appears that those warnings preceded the asserted change in attitude towards him by Lascelles.

Holibaugh admitted that he saw a truck come in as he was preparing to leave on the evening of October 20 and that, despite knowing he was the person charged with unloading the truck and what Respondent's policy was towards overtime, he did not respond to that policy but left the premises. This occurred shortly after he became union president and, according to his own testimony, attempted to negotiate with Respondent some restrictions on mandatory overtime, in essence acknowledging that overtime was mandatory for employees. The reasons Holibaugh gave for not working overtime amounted to a refusal to do so despite Respondent's necessity to unload trucks that came to its premises.

[35] I credit Lascelles where there is a conflict between Holibaugh and Lascelles, finding that Holibaugh had a heavy bias against the Company and Lascelles, as demonstrated by Holibaugh's testimony, and that there were some contradictions in his testimony. The details

of conversation are glossed over to an extent by Holibaugh whereas Lascelles' testimony is more precise and seems to indicate a finer retention of what occurred.

Basically, Respondent agrees that Holibaugh's name was called a large number of times over the intercom on the day he was discharged but it was not because Respondent was harassing Holibaugh, but rather because Holibaugh was not doing the jobs he was supposed to do, and it was necessary to call him a number of times to try to get him to do those jobs. Lascelles' testimony regarding Holibaugh's delays in responding to his instruction to come to the end of the line and move trailers appears to emphasize that point.

If Respondent sought to punish Holibaugh for his union officership and activities, it could have done so by suspending him on October 29 when it had the opportunity and Holibaugh appeared to be insisting on it. In fact, looking at the number of written warnings Holibaugh had received within a 90-day period, the warning of October 21 was the third warning within a 90-day period and the warning of October 29 was the fourth. Presumably, under such circumstances, Respondent could have suspended Holibaugh on the 21st and possibly have terminated him on the 29th of October. However, as Lascelles explained, he wanted Holibaugh to acknowledge the Company's policy on overtime and to observe it and gave him the warning for that purpose and not to punish him or attempt to get rid of him.

If Respondent wanted to rid itself of Holibaugh on the basis that he was refusing to work overtime and in effect seeking to dictate to Respondent what his hours of employment would be, it apparently could have done so and the Board, on the basis of *F. W. Woolworth*, 204 NLRB 396, would have found that to be good cause. But

Respondent sought to have Holibaugh accede to its wishes concerning overtime and did not suspend or discharge him then.

I credit Lascelles that Holibaugh's activities during the final week, where he appeared to be engaged in and to encourage others to engage in a slowdown of work, added to his refusals to work overtime, created a situation where Holibaugh was not amenable to what was demanded of him in his job, and find that the discharge was for good cause and that it overbalances any *prima facie* case of discrimination. Accordingly I will dismiss Complaint paragraph 38.

[36] F. *The ULP Strike Allegation*

There is agreement, noted above, that the employees engaged in a strike from November 20 until December 1. Complaint paragraph 10(b) alleges that this strike was caused and prolonged by Respondent's unfair labor practices, and General Counsel asserts that the discharge of Holibaugh was one of the reasons for the strike and, urging that Holibaugh's discharge violated Section 8(a)(1)(3), claims that the strike was an unfair labor practice strike giving participants therein rights to reinstatement, which are more particularly alleged in Complaint paragraph 39.

Counsel's position is undercut by my finding that Holibaugh was not discharged in violation of the Act. Even if I had found that Respondent had violated the Act in terminating Holibaugh, I would still not find that the strike was an unfair labor practice strike.

There is no dispute that on Sunday, November 14, the employees by an overwhelming vote agreed to strike after refusing to accept Respondent's contract offer. It is

clear from the testimony that during most of the following week the employees sought to convince Newman that Respondent should pay the $5 per hour amount which the Union was seeking in these negotiations, and Newman responded that he could not do so. It is clear from the testimony that an impasse had developed concerning rates of pay.

During the week prior to the strike, a second meeting was held at an employee's house and another strike vote taken, and again the results were overwhelming in favor of striking. On Thursday, November 18, Eddy, who had become convinced that the employees should not strike, sought another strike vote in the lunchroom, and it is clear that the strike again was supported by a great majority of those present. All of these events occurred prior to the Holibaugh termination.

As noted above, on the evening of November 18 an impromptu meeting was held at Phyllis Hick's house with eight or nine employees present where sentiment was expressed about going out on strike prior to the strike date because of Holibaugh's termination. Union Representative Campbell told the employees that they must wait until the strike date according to the terms of the contract.

On November 19, a number of employees stayed off from work or came in to work and left early, claiming that they were sick, but the purpose of such actions was not demonstrated.

No mention was made of an unfair labor practice origin of the strike on the picket signs and no claim was made to Respondent prior to, during or after the strike that the strike had been caused at least in part by Holibaugh's termination or any other unfair labor practices, until this case.

[37] The strike lasted from November 20 until December 1, and there is nothing in this record to indicate that the strike was prolonged in any manner by anything that Respondent did or did not do, and such prolongation is only a presumption by the General Counsel with nothing to substantiate it. The 8(a)(1) violations found above were not considered by the strike participants, and I conclude that it was an economic strike.

Accordingly I find that the strike was not an unfair labor practice strike and that employees who struck are not entitled to reinstatement on that basis as alleged in Complaint paragraph 39. I dismiss Complaint paragraph 10(b) and that part of Complaint paragraph 39 which asserts reinstatement rights based on a ULP strike. See *Romo Paper Products*, 208 NLRB 644.

G. *The Pay Raise Allegation*

Complaint paragraphs 40 and 41 assert that Respondent violated Sections 8(a)(5) and (1) of the Act by not notifying and bargaining with the Union in regard to the pay raise and bonus rate it paid employees on or after November 22.

Having previously found that the parties were at an impasse concerning pay rates prior to the strike and that Respondent was therefore free to pay employees who worked during and after the strike rates it had offered to the Union and with Union Representative Campbell's testimony that the bonus rate alleged as violative in Complaint paragraph 41 was less than the amount the Company had proposed in its contract offer, it follows that these two allegations are without foundation, and accordingly I dismiss them.

H. *The General Refusal-to-Bargain Allegation and Respondent's refusal to Further Recognize the Union*

Complaint paragraph 45 alleges that all of Respondent's conduct, as set forth in the Complaint from paragraph 12 on demonstrated course of conduct, bad-faith bargaining by Respondent with the objective of avoiding meaningful negotiations with the Union and avoidance of a contract with the Union and the discouragement of employees from engaging in the Union or protected activities for the purposes of collective bargaining.

With the exception of Complaint paragraphs 29, 35 (a) and 37 wherein I have found violations, and with the further exception of Complaint paragraph 44 where I will find a violation, the remaining unfair labor practice allegations of this Complaint have been dismissed.

[38] General Counsel has not demonstrated any egregious unfair labor practices concurrent with the negotiations which ceased on November 12, which would substantiate the course of conduct, bad-faith bargaining allegations in Complaint paragraph 45. Nor has General Counsel produced any evidence concerning Respondent's conduct during the negotiations, such as reneging on agreements, surface bargaining, etc., which would support his allegations. In short, there is nothing through the time of the strike which would show other than that Respondent engaged in good-faith bargaining with the intention of reaching an agreement.

Therefore I cannot find that Respondent engaged in course of conduct, bad-faith bargaining. It appears that any violation of Respondent in its duty to bargain with the Union occurred following the strike, and not during the negotiations prior to the strike.

I do find that Respondent had a duty to recognize and bargain with the Union during and after the strike and that the reasons advanced by President Newman in his testimony, and by Respondent in its brief, for terminating its negotiations with the Union and refusing to recognize it as its employees' bargaining agent on and after December 1, 1976, were insufficient and that by such termination and refusal to recognize, Respondent violated Sections 8(a)(5) and (1) of the Act.

President Newman testified that he got a letter from the Union around December 10 and, at that time, did not believe he had an obligation to continue to bargain with the Union. He based his decision on the following: (1) The Union went out on strike and terminated its contract and they did not have a contract at the time of the hearing; and (2) That the strike started out with a few people (meaning pickets) which did not represent 50 percent of the work force and dwindled every day during the strike. He said "Those people came back to work before the strike was over." Asked who did, he named Norma Crow and said several others did. He also testified that a further reason was that he had received a list of employees who had resigned from the Union. The list to which he referred is the list of 13 employees on the document prepared by employee Piper. General Counsel urged that two of these people later joined and supported the strike. This is all the reasons given by Newman as to why he felt he had no obligation to bargain further with the Union.

Respondent's brief list 13 reasons which Respondent asserts warranted it in refusing to bargain further with the Union. Those reasons are as follows:

[39] 1. The Union was *voluntarily* recognized in February 1972.

2. It did not achieve a collective-bargaining agreement with Respondent until November 1973.

3. The collective-bargaining agreement contained a union shop clause providing for mandatory union membership and a dues checkoff provision but no authorizations for dues checkoff were provided to Respondent until June 1975.

4. There was insufficient interest by the employees in the Union to support the establishment of their own local union until the summer of 1976.

5. Less than a majority of the employees, on the average, attended the union meetings in 1976 during which the local union was established.

6. Union officers had to be appointed, rather than elected, because of such lack of interest.

7. Four of the seven local union officers resigned from the Union during negotiations or before the strike.

8. Thirteen employees, including three of these four officers, executed a written union resignation and gave MHE's president a copy.

9. Thirteen or fourteen bargaining union members worked during the strike.

10. The strike lasted only 7 workdays and only 10 to 12 employees attended the union meeting terminating the strike.

11. The Company had no meetings with and made no concessions to the Union during the strike to warrant its termination.

12. Only 14 of more than 40 employees had more than 6 months of servcie with the Company in November 1976, and almost all of them worked during the strike, and

13. Respondent's work force historically experiences high turnover and fluctuates widely in number.

The first six reasons advanced by Respondent have to do with the manner in which the Union was first recognized and what occurred on various dates between 1973 and the summer of 1976 and although providing some background, really have nothing to do with the majority status of the Union in 1976. It is true that under the contract provisions employees were to obtain union membership on or after 30 days' employment and maintain it, and that dues deductions were authorized by the employees and the amounts paid by Respondent to the Union. However, granting that, these first six reasons are not relevant to the question before us.

It appears from the testimony that the president of the Local resigned from the Union during negotiations and apparently left the Company to go into business for himself. There is no allegation that he continued with the Company and his name does not appear on Company records. Other officers or members of the negotiating committee resigned from the Union prior to the strike.

[40] On the document prepared by Piper there are 13 signatures. One or two of the employees indicated that they later withdrew these resignations and did not work during the strike, and there may have been several other people who were members of the Union who went in and worked during part of the strike. There is no dispute as R.B.[2] paragraph 10 alleges, that the strike lasted only 7 workdays and that the meeting held to terminate the strike was attended by 10 to 12 members.

R.B. paragraph 11 states that the Company held no meetings with and made no concessions to the Union

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2. R.B. stands for Respondent's brief.

during the strike to warrant its termination, which only means that the Union did not win the strike but voted to terminate it for the members' own reasons, not because of any concessions made by Respondent. This does no more than tell us that the impasse which started the strike was still extant at the close of the strike.

R.B. paragraph 12 alleges that of the 40 employees who were union members and had dues deductions during the month of November only 14 of that number had more than 6 months' seniority with Respondent. It appears to be a fact that most of that group worked during the strike, with the notable exception of Phyllis Hicks.

Respondent's last reason is that its work force historically experiences high turnover and fluctuates widely in number.

All of these reasons, taken singularly or considered together, do not overturn the fact that in the formal strike vote taken prior to the strike by the Union, the members voted to strike by 28 to 2, with 2 voids or abstentions. The margin was nearly the same in the two other votes which took place on November 17 and 18, with more than a majority of the employees then employed voting to strike.

Even if we were to grant that the 13 resignations were all authentic and continued in force, despite testimony to the contrary on two of them, it would still be mathematically clear that the Union represented a majority of the employees at the time of the strike. There is no evidence which credibly demonstrates a shift of employee sentiment to opposing the Union during or after the strike. The employees who did not resign from the Union must, under the present evidence, be presumed to still have supported the Union during and after the strike.

[41] In *Cantor Brothers, Inc.*, 203 NLRB 744, Judge Taplitz noted some of the cases which seemed to be controlling in that case and in the present instance. He cited *Coca-Cola Bottling Works Inc.*, 186 NLRB 1050, as standing for the proposition that an employer could not rely on the refusal of some employees to go on strike or the return of striking employees to work as a basis for Company withdrawal of recognition from the Union, since the Board would not presume that failure to support a strike or returning to work during a strike indicated a lack of support for the Union. There are any number of reasons why employees would work during a strike even though they supported a union or abandoned the strike while it was still going on.

Here, Respondent seems to equate the number of pickets with the number of employees who support the strike. This is not a reasonable test. The number of pickets merely shows that those pickets are actively engaged in demonstrating their support for the Union. Others may support the Union but not actively demonstrate their support.

The Board has held in *Pennco*, 250 NLRB No. 93, that strike replacements and new employees are not automatically counted as antiunion. Basically, the Board considers that replacements may support the union in the same proportion that employees did prior to the strike. The Board has stated that there is a heavy burden of proof on an employer since it will not presume the replacements do not support a strike. It stated that to do so would be to overburden the right to strike because if that were the guide, then an employer could refuse to recognize the Union any time there was a strike and replacements. See *Cavalier, Div. of Seberg Corp.*, 192 NLRB 290.

Respondent may have presumed that with the corps of senior employees it retained, most of whom did sign the document resigning from the Union, that it felt the less senior employees had no particular interest in the Company and that it could refrain from negotiating with the Union based to some degree on the number of replacements and new employees it would be bringing into the Company as it expanded.

However, if this was its hope, it is unavailing as a defense in this instance because under Board precepts Respondent has produced no credible evidence to demonstrate other than what [sic] the Union continued to represent a majority of Respondent's employees. On this basis, it is clear that Respondent violated Sections 8(a)(5) and (1) of the Act when it refused on and after December 10, 1976, to recognize or negotiate with the Union as the collective-bargaining representative of the employees in Respondent's P & M unit, and I so conclude and find. The Union's request for further negotiations contained in its December 10 letter to Respondent was ignored and in essence refused and Respondent's counsel's answer on December 17 was nothing more than a palliative smoke screen.

[42] I. *Requests for Information*

Respondent admits that it received the December 10 letter from the Union which, among other things, requested that Respondent furnish it with a list of all employees which would include their names, addresses, dates of hire, rates of pay, and the department in which they were working. Respondent admits that it failed and refused to provide the Union with such information and says the information was not relevant and necessary to enable the Union to perform its responsibilities as a bargaining

representative because the Union no longer represented the employees. However, as noted above, I have found that Respondent's refusal to recognize and negotiate with the Union on the basis of its belief that the Union no longer represented a majority of the employees was ill-founded and, under Board law, was improper and violative of the Act. Since the Union did represent the unit of employees and this information was proper and necessary to its functioning as a collective-bargaining representative, particularly following the strike in this matter, I conclude and find that Respondent's refusal to furnish this information to the Union, as alleged in Complaint paragraph 44, was an independent violation of Sections 8(a)(5) and (1) of the Act.

J. *The Alleged Refusal to Properly Reinstate 12 Employees*

Parnell Smith, one of the 12 named in Complaint paragraph 39, apparently did not cooperate in the investigation in this matter, and General Counsel on the record stated Smith had failed to appear and agreed to dismiss him from the case. It would appear therefore that Smith should not be considered in this matter based on the transcript.

The remaining question is whether the *Laidlaw* rights of these 11 individuals were violated in any manner by Respondent's course of offering reinstatement to some and not others.

It is clear from the record that a number of employees who were active in the Union and in picketing, such as Phyllis Hicks, were reinstated immediately after the Union voted to discontinue the strike. This vote took place in the evening of December 1, and Union Representative Campbell requested the Union's director to inform Respondent of the cessation of the strike. In a letter

to the Company dated December 1, the Union on behalf of all the striking employees made an unconditional application and offer to return to work and requested immediate reinstatement.

During the strike Respondent had employed employees from a sister corporation and had advertised for other employees and had hired some people. Roger Simpson was hired during the strike on November 30 as a yardman, presumably to replace Holibaugh.

[43] Respondent stated that it did not hire or recall many people between December and February since it had a few orders and had a trailer show in Kentucky and used a number of the people to prepare and set up its trailers for that show. Additionally, because of the strike, Respondent had refused some orders and cut down on some materials and stated it did not have enough orders for a full crew during those winter months. As mentioned, *supra*, Respondent builds its product solely on order and does not produce for its own inventory.

Respondent admitted it hired some people in the interim and gave its reasons why it hired them and did not recall some of the employees who had struck and had not yet been returned to work.

Respondent hired Greg Cantler on January 14, 1977, to work in Partition II. It stated that Cantler had worked for the Company previously, was experienced, had left, went to Florida and returned, and there was no one else available on the list of people who had gone on strike who could do the job he filled.

Lascelles testified he hired Brenda Walter on January 14, 1977, to work in the metal department because there was no one else to fill the job and made reference to manual dexterity needed for the job. Asked why he

had not brought back either Woodall or Gentry who had worked on roofs, Lascelles testified that was a different type of job and they would not have been able to perform it.

Gary Simpson and Charles Sergent were hired on January 26, 1977, in Partition I. Lascelles stated that there were no other people among those who had struck who were able to do the job.

Rita Blazekovitch was hired on February 3, 1977, in the trim department, and again Lascelles stated she was hired because no one else was available who could do that job.

Tom Raub was hired on February 15, 1977, and had worked for the Company previously. He had left several months before the strike and was hired by the Respondent as a yardman and swingman since he was a versatile employee who could do a number of different jobs. These were all the persons who were hired before Respondent called some of those listed in paragraph 39 back to work.

Asked whether some of the strikers could have been trained for some of these jobs, Lascelles said it would have taken as much training to retrain them from their previous work as it would be to put on new employees and that some of them would not have been as dexterous as the persons he hired and some of those he hired had previous experience with the Company. Most of the 11 had been with the Company only a short time prior to the strike.

[44] Respondent further stated that whether a person had been on the picket line or did not work during the strike had nothing to do with its decision on whether to return that person to work. In regard to the 11 employees, we have the following testimony:

1. Charles Albertson was brought in by the Company during December and worked a half day. Albertson stated that prior to that time he had called the Company and was told he was in a layoff status and that Respondent had sufficient employees at that time. He said that following the half day in December he never heard anything from the Company and got another job. In March 1977, he was called by the Company to return to work but did not respond since he had another job.

Albertson admitted that he had returned to Terry Industries in Edgerton in January 1977 and had worked there for 2 years and was laid off there when he went to work for Respondent in August 1976. He said he was making more money there than he had ever made at Respondent.

2. Lascelles testified that he called Robert Belknap to come back to work and Belknap said he would do so but did not show up.

On rebuttal, Belknap testified that he did not have any such conversation with Lascelles about returning to work and said that Lascelles was not a supervisor. This testimony of Belknap is incomprehensible, considering Belknap's prior testimony as to the supervisory status of Lascelles and as contrasted against the fact that Lascelles was a foreman who was recalling other employees. In any event, Newman called Belknap around February 6, asking him to return to work, and Belknap said he finally reported back to work around February 14.

3. Don Blankenship stated that he picketed and following the strike he and employee Schooley talked to one of the secretaries in the office and were given layoff slips. Blankenship said he tried Respondent again in February and March and was told he was still on layoff and was finally recalled on April 4, 1977.

Lascelles testified that he did not need Blankenship immediately after the strike but attempted to call him several times later and was not able to get him.

4. Schooley testified he called the Company and was told that he was out of a job and implied that this was at the end of the strike and did not corroborate Blankenship's testimony. He said he received an offer in February or March and talked to Foreman Lascelles and did not like what Lascelles had to say and did not go back to work.

[45] Lascelles stated that he was unable to reach Schooley the first few times he called but finally got him and asked him to come to the plant. He told Schooley that he needed him to work but wanted better attendance from Schooley than he had before. Schooley said he was healthy and would be in to work every day and would report the next morning. Schooley never showed up, and Lascelles said he never heard from him again.

5. John Carpenter was a probationary employee when the strike started and lived some 20 to 25 miles from Bryan, Ohio. He did picket duty about three times but did not know when the strike ended and did not learn that it had ended until some 2 to 3 weeks later. He said that about a month after the strike ended, he went to the plant and was told there were no openings.

Lascelles testified that he discussed probationary employee Carpenter with Brannun, and they decided they should not bring Carpenter back to finish out his probationary period since Carpenter had poor attendance and was a sloppy worker and they did not believe he should be kept as an employee.

6. Dale Thomas was a probationary employee who did not testify in this case since apparently he was unavailable out of state. Lascelles testified that Thomas had

worked in the ceiling-sidewall area and when someone was needed in that department, he checked with the people in that department, since he was not familiar with Thomas, and asked them about Thomas' work. He testified that all the people in the department, including the leadman, said they did not want Thomas back and so he did not make any offer to Thomas to return to work but terminated him as a probationer.

7. Pat Gentry stated that early in the strike he called regarding a job and was told that the metal work was being done by the people that had been brought over from the sister company, Mini Mansions. He did not receive a call to return to work until February 16 when he was called by Lascelles, and he reported back on February 17.

8. William Kochenour was a probationary employee who stated that he began with Respondent on October 5. He said he signed the document prepared by Piper since he understood he could keep on working if he resigned from the Union but then did not work during the strike. He said he returned to work about 2 days after the strike was over and worked 2 days and took a day off work to take his wife to the doctor. He said he called in and was told that he had been fired.

[46] During cross-examination Kochenour stated that he did not know that the contract provided for a 45 working day probationary period before a person acquired seniority and had assumed he was over the probationary period when he joined the Union. He agreed that he went back to work around December 3 and, when asked whether he punched in 9 minutes late Thursday, said he did not punch in at all, that his card was not there and he did not recall punching out. Then he testified that he did not work that day. Later he testified that maybe

he did punch in that day but he did not recall being 9 minutes late. Asked if he had taken his wife to the doctor on Thursday or Friday, he said he might have punched in 23 minutes late on another day. When asked if his record was that after being recalled following the strike, he was late the first 2 days and missed the third day, he said that could have been the record but he did not recall it. He also admitted that he had been absent four times in his employment prior to the strike.

Lascelles stated that he had recalled Kochenour to work as a probationary employee because he hoped he would become a good worker. However, Kochenour was late twice and missed a third day and Respondent terminated his probationary employment at that time.

9. Mike Marvin testified that he was not on active picket duty during the strike and began, during the strike, to look for other employment. He said that after the strike he sought to go back to Respondent and had not found a job yet. He said Respondent had an ad in the paper and he went to the plant and saw one of the secretaries and asked if he needed to fill out an application and she said his application was still current. Marvin said he saw another ad in the paper in April 1977 and made an application then and talked to Lascelles. Lascelles asked if he was working and he said he was, and Lascelles told him that he did not need part-time help and Marvin said he was looking for full-time employment. Lascelles said he did not think Marvin could handle it and they would not need him.

During cross-examination Marvin attempted to evade the question of whether on November 29 he had a discussion with anyone in the Company about quitting as an employee at Respondent. He answered the question by saying he quit active picket duty to go look for work.

Asked again whether he spoke to the secretary, Mrs. Ellis, concerning quitting as an employee, he stated he called in and told her that he was not on picket duty any more and was looking for employment and needed to go to work. Asked if he told Mrs. Ellis he was making an application at another Company and wanted Respondent's records to show him as a "quit," he evaded the question and stated that at that time he had not made an application to the other Company. He testified that he was planning to make an application but that nobody knew it and, to his knowledge, he did not tell her of his plan. He denied asking Mrs. Ellis to tell the other Company he had quit at Respondent but stated that he started work at the other Company in the first part of December and was still there working on the third shift.

[47] Mrs. Ellis testified that Marvin asked her about getting a slip to show that he had quit so that he could get a job with the Arrow Corporation. Lascelles testified that he gave Marvin a quit slip when Marvin crossed the picket line into the plant asked him for one.

In regard to credibility determinations here, I credit Ellis and Lascelles that Marvin asked both Ellis and Lascelles for a quit slip and procured one from Lascelles. There would be no reason for Marvin to make a call or come to the plant to merely tell someone at the plant that he was not on active picket duty and was seeking a job some place else. His April request of Lascelles for a job evidently was taken by Lascelles as an application for a second full-time job, with Lascelles answering that he did not think Marvin could handle a second full-time job and they would not hire him.

10. Lascelles testified that on November 19, the day prior to the strike, he wanted some partitions built because they were behind, and spoke to Jeff Schilt and one

other person who said they were going home. He asked them to stay and finish building the partition they were working on and Schilt said he would not do so, that he was going to quit because he could not afford to go on strike and he had to get another job and therefore was quitting. According to Lascelles, Schilt resigned at that time and left.

Schilt testified that he did not walk the picket line but stayed home during the strike and did not work. He said he did not receive any message from Respondent about returning to work and denied having any conversation with Lascelles about quitting. He lived about 24 miles from Respondent's plant and said he had not learned that the strike was over when he started work at General Tire on February 9, 1977.

I credit Lascelles that Schilt told him he was quitting. I do not see how Schilt could have had any interest in a job at Respondent or in returning to work there, living a mere 24 miles away and not making any effort to determine if the strike had ended before starting work for General Tire almost 2 1/2 months after the strike ended at Respondent. Schilt's actions were those of a person with no interest in Respondent, and I credit Lascelles that he quit.

11. Gary Woodall testified that he called Lascelles in March 1977 regarding a job and was told to come in. Lascelles offered him a job working in the ceiling department although Woodall had worked in the metal department prior to that time. Lascelles felt that Woodall could do the job. Woodall agreed to do it and went to work in the ceiling department in March.

[48] On the basis of the transcript testimony and my credibility determinations, I have determined that em-

ployees Marvin and Schilt quit their jobs before the strike ended and that Respondent need not offer them any employment.

Probationer Kochenour was reinstated shortly after the strike ended but was thereafter fired for apparent good cause, and I find that Respondent need make no further offer of employment to Kochenour.

Employees Woodall, Belknap, Gentry and Blankenship were recalled from February on, in 1977. Respondent testified that it had no openings that they could fill prior to that time, and there is no countervailing evidence. I therefore find that Respondent owes no further or prior duty to these employees, and there is no proof that it should have recalled these individuals prior to when it did.

Schooley was recalled and did not come in after agreeing to do so. I do not find that there is any evidence that he should have been recalled earlier and find that Respondent owes him no offer of reinstatement at this point since he refused its offer.

Albertson worked for half a day in December but then got a job where he had been previously employed and laid off and did not respond to any offer from Respondent. It is apparent that he had a job at the other Company early in December and did not intend to return to Respondent, and so Respondent owes him no further offer of reinstatement.

Probationers Carpenter and Thomas were not offered jobs since they were considered inadequate, poor employees. There is no testimony to demonstrate that their union membership or activity had anything to do with the Respondent's not offering to reinstate them. It would be a futile gesture to say Respondent must make them an offer but would then be free to terminate them as inade-

quate employees. Accordingly I find that Respondent, under these circumstances, is not obligated to offer them reinstatement.

Accordingly I dismiss Complaint paragraph 39.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth above in section II which have been found to constitute unfair labor practices in violation of Sections 8(a)(1) and (5) of the Act, occurring in connection with Respondent's operations as set forth in section I above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[49] IV. The Remedy

Having found that Respondent engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist therefrom and, upon request, bargain collectively in good faith with the Union as the exclusive representative of all employees in the unit set forth below in the Conclusions of Law, and in the event that an understanding is reached, embody such understanding in a signed agreement. Respondent shall be ordered to comply with the Union's request for information concerning the employees in the unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(a) of the Act:

> All production and maintenance employees at Respondent's Bryan, Ohio place of business, but excluding plant clerical employees, office clerical employees, road service employees, truck drivers, and guards and supervisors as defined in the Act.

4. The Union is the exclusive representative of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By withdrawing recognition from the Union and by refusing to meet and bargain with the Union on and after December 10, 1976, and by refusing to provide the Union with requested information regarding unit employees, their names, addresses, jobs, rates of pay, etc., Respondent violated Section 8(a)(5) of the Act.

6. By the foregoing conduct Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed to them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

[50] 7. Respondent further violated Section 8(a)(1) of the Act by:

(a) Telling employees that after withdrawing from the Union, they should form their own union.

(b) Telling employees that their union was no good and costs them money and they should resign from it and form their own union.

(c) Urging employees not to engage in a strike and not to support their Union.

8. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

Respondent, Mobile Homes Estates, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize, meet and bargain with International Union, Allied Industrial Workers, AFL-CIO, and its Local 712, as the exclusive representative of its employees in the following unit:

> All production and maintenance employees at Respondent's Bryan, Ohio place of business, but excluding plant clerical employees, office clerical employees, road service employees, truck drivers, and guards and supervisors as defined in the Act.

(b) Refusing to provide the Union with requested information concerning unit employees.

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3. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[51] (c) Telling employees that after withdrawing from the Union, they should form their own union.

(d) Telling employees that their union is no good and costs them money and they should resign from it and form their own union.

(e) Urging employees not to engage in a strike and not to support their Union.

(f) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively with said Union as the exclusive representative of its employees in that bargaining unit and, in the event that an understanding is reached, embody such understanding in a signed agreement.

(b) Provide the Union with the information it requested in its December 10, 1976, letter and with any similar information it may request.

(c) Post at its Bryan, Ohio, plant copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places

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4. In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. March 16, 1981

/s/ JOHN M. DYER
John M. Dyer
Administrative Law Judge

LETTER, FEBRUARY 25, 1980, GEORGE A. LEET, NLRB, TO DONALD M. MEWHORT, JR. AND ROY A. CAMPBELL

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 25, 1980
Re: *Mobile Home Estates, Inc.*
Case 8-CA-10691

Bernard Levine, Regional Director
National Labor Relations Board
1240 E. 9th Street - Rm. 1695
Cleveland, Ohio 44199

Donald M. Newhort, Jr., Esq. [sic]
Shumaker, Loop & Kendricks [sic]
811 Madison Ave., Suite 500
Toledo, Ohio 43624

Roy A. Campbell, Reg. Rep.
Int'l. Union, Allied Industrial
Workers, AFL-CIO and its
Local 712
247 Danberry Street
Toledo, Ohio 43609

Dear Counsel:

By a Board Order dated July 12, 1979, this case was remanded to Administrative Law Judge Ivar H. Peterson to make certain resolutions of conflicting testimony and specific findings of fact as described therein. Since that date Judge Peterson has retired from the Agency without issuing any supplemental decision as called for in the Board's

Order. The Board is, therefore, desirous of expediting this matter as much as possible and hereby requests the positions of the parties as to the best means of resolving the matter in light of the issues raised by its Order. Accordingly, you are requested to advise the Board whether you are willing to have the issues resolved by referring the case to another Administrative Law Judge for findings and conclusions based on the present record or whether you believe the matter should be disposed of by hearing *de novo* before a different Administrative Law Judge who would then issue his own decision and recommended order. A third alternative would be for the parties to be able to arrive at a settlement agreement based on the outstanding complaint.

In view of the posture of this case and the issues raised by the Board's Remand Order, please advise your position as promptly as possible as to which course of action you wish to pursue. Such Statements of Position must be submitted to the Board in accordance with Section 102.46(j) of the Board's Rules and Regulations and must be received in Washington, D. C. on or before March 12, 1980. The Board will, thereafter, take appropriate action in light of the parties' statements and its prior Order.

Very truly yours,

/s/ GEORGE A. LEET
George A. Leet
Associate Executive Secretary

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

(Dated July 12, 1979)

Case 8-CA-10691

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOBILE HOME ESTATES, INC.

and

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS, AFL-CIO AND ITS LOCAL 712

On six days commencing May 16, 1977 and ending June 8, 1977, a hearing was held before Administrative Law Judge Ivar H. Peterson, upon a complaint, an amended complaint, and a second amended complaint issued in this proceeding alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. On September 29, 1978, the Administrative Law Judge issued his Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

The Board, having duly considered the matter, is of the opinion that although based on his conclusions of law the Administrative Law Judge thereby implicitly made credibility resolutions, the disposition of the issues of whether Respondent violated Section 8(a)(1), (3) and (5) of the Act would be facilitated by more specific resolutions of the conflicting testimony of witnesses and spe-

cific findings of fact by the Administrative Law Judge.[1] The Board is further of the opinion that the disposition of the issues of whether Respondent violated Section 8(a)(1) and (3) with respect to the matters described below particularly requires specific resolution of conflicting testimony and specific findings of fact.

In his Decision, the Administrative Law Judge set forth the names of 10 strikers who either were not recalled or whose recalls were delayed by Respondent. Although in the "Discussion and Conclusions" section of his Decision, the Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) by such conduct, in his Conclusions of Law, recommended remedy, and recommended Order he specifically refers by name only to some of the 10 strikers.

[2] The General Counsel contends that the Administrative Law Judge's failure to include in his recommended Order the names of all the strikers who were not recalled or whose recalls were delayed by Respondent was inadvertent. Respondent contends that the Administrative Law Judge's recommended Order should not be amended to include strikers who were not immediately reinstated following the termination of the strike but who were later reinstated. The Board is of the opinion that its determination herein requires that the Administrative Law Judge in his Supplemental Decision specify by name which strikers involved herein he has found Respondent unlawfully failed to recall or delayed in recalling, and specify in his Supplemental recommended Order which strikers, by name, are included within its remedial provisions.

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1. In this regard, the Board particularly notes that although the Administrative Law Judge concluded that Respondent unlawfully made changes in the terms and conditions of employment of its employees he failed to set forth any facts supporting this conclusion.

Further, in this regard, the Administrative Law Judge failed to make credibility resolutions and specific findings of fact with respect to the alleged Section 8(a)(1) and (3) violation based on Respondent's conduct toward Michael L. Marvin. The complaint alleged, *inter alia*, that on or about December 2, 1976, Respondent refused to reinstate, and at all times since then has continued to refuse to reinstate Marvin to his former or substantially equivalent position or employment because he engaged in a protected concerted activity. Respondent denied the above allegation. Marvin testified that he went on strike on November 20, 1976, and joined some of his fellow employees on the picket line. On or about November 29, 1976, he began a search for other employment, at which time he ceased active picket duty. He discussed with a few people on picket duty and with Respondent the fact that he was going to be looking for employment. He denied telling anyone where he was going to apply for a job. He also denied that he requested from Respondent a resignation slip or that he asked Respondent to inform another employer that he had quit his job. Respondent adduced testimony that Marvin requested a quit slip which he needed in order to obtain another job.

Although, as noted above, the Administrative Law Judge set forth the names of 10 strikers involved herein, and found that Respondent unlawfully failed to recall or delayed in recalling certain of the strikers, he failed to indicate whether he intended to include or exclude Marvin from that group of strikers. In his exceptions, the General Counsel asserts that this failure by the Administrative Law Judge was an inadvertency and that Marvin should be added to the list of those strikers not recalled. Respondent, in its exceptions, asserts that Marvin was not eligible for reinstatement and there was no duty to recall him.

[3] The Administrative Law Judge also failed to make credibility resolutions and specific findings of fact with regard to striker Jeff Schilt.[2] He found that Schilt was not recalled in violation of Section 8(a)(1) and (3), but he failed to resolve a conflict in the testimony. Schilt testified that he went on strike on November 20, 1976, but that he did not walk the picket line. After the strike had terminated Respondent did not make any offer or contact him with respect to returning to work. He denied that he talked to any of Respondent's officials regarding his quitting his job. Respondent, however, adduced testimony that the afternoon before the strike commenced, Schilt told a supervisor that he was going to quit and that he could not afford to go on strike because he had to have another job. Respondent asserts that Schilt actually quit his job prior to the strike and was not eligible for recall. Accordingly,

IT IS HEREBY ORDERED that this proceeding is remanded to Administrative Law Judge Ivar H. Peterson for the purpose of preparing and issuing a Supplemental Decision and Order setting forth specific resolutions of the credibility of the testimony of witnesses and containing specific findings of fact concerning the alleged violations referred to above in light of such credibility resolutions. Following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D.C., July 12, 1979.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

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2. The Administrative Law Judge erroneously referred to Schilt as "Schief".

DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

(Dated September 29, 1978)

Case 8-CA-10691

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MOBILE HOME ESTATES, INC.

and

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS, AFL-CIO AND ITS LOCAL 712

ROBERT WEISMAN, ESQ. and
ROBERT L. BURCH, ESQ.,
of Cleveland, Ohio, for
the General Counsel.

DONALD M. NEWHORT, JR., ESQ. [sic]
(SHUMAKER, LOOP & KENDRICK),
of Toledo, Ohio, for the
Respondent.

ROY A. CAMPBELL, REG. REP.,
of Toledo, Ohio, for the
Union.

DECISION

Statement of the Case

IVAR H. PETERSON, Administrative Law Judge: This case was heard by me in Bryan, Ohio, on 6 days com-

mencing May 16 and concluding on June 8, 1977, based upon the complaint issued by the Regional Director for Region 8 on February 28, as amended at the opening of the hearing, which in turn was based upon a charge filed by International Union, Allied Industrial Workers, and its Local 712, herein called the Union, on December 27, 1976, against Mobile Home Estates, Inc., herein called the Respondent, alleging that the Respondent had engaged in conduct violative of Sections 8(a)(1), (3) and (5) of the Act. In its answer, dated March 2, the Respondent admitted certain jurisdictional allegations of the complaint but denied that it had engaged in any unfair labor practices.

Upon the entire record in the case, and from my observation of the witnesses as they testified, and a consideration of the briefs filed with me by the Respondent and the General Counsel on August 22, I make the following:

[2] Findings of Fact

I. Jurisdiction

The Respondent, an Ohio corporation, maintains its principal office and place of business in Bryan, Ohio, where it is engaged in the manufacture and non-retail sale of mobile homes. The business is seasonal and its complement of employees fluctuates from a handful to as high as 70 to 80 in the peak summer period. Admittedly, the Respondent is engaged in commerce within the meaning of the Act and comes within the jurisdictional standards of the Board. James Newman is president of the Respondent and Clarence Brannum is plant manager; Ron Lascelles is the plant superintendent. The complaint, as amended, alleges that one Steven Miller is a supervisor.

The Respondent, however, denies that he occupied the position of supervisor at all times material to the allegations of the complaint. The Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Introduction*

At the outset, it seems advisable to determine the status of Miller, whom the Respondent contends is not a supervisor. Since the first of April 1976 Miller has been the Respondent's director of marketing. In that capacity, he is responsible for the conduct of the sales force of the Respondent and is only accountable to Newman. Miller testified that his duties include the "responsibility for all sales and shipment, responsibility for the sales period, product literature, dealer meetings, inspection of units on a buy-sell system." He also testified that one of his duties is interviewing salesmen applying for employment and making recommendations to President Newman with respect thereto. He related that Newman usually follows his recommendations. Moreover, Miller testified that he had recommended that salesmen be terminated and that with Newman's approval he has terminated salesmen. Miller has also disciplined salesmen and in a newspaper advertisement for job applications prospective applicants were requested to contact Miller to arrange for employment interviews. Miller testified that since his employment in April 1976, he has been hiring employees, interviewing applicants and disciplining employees. I am satisfied that the record clearly demonstrates that Miller is a supervisor within the meaning of Section 2(11) of the Act, and I so find.

[3] B. *Failure and Refusal to Reinstate Strikers*

Roy Campbell, the Regional Representative of the Union, testified that the last negotiating session between the parties was held on November 12. The Union held a meeting on November 14, at which it explained the Respondent's proposal to the membership and after that had been done there was a question and answer period. A motion was made to reject the Respondent's offer and a secret ballot vote was taken. Of the 32 members present, the vote was 31 to 1 to reject the Respondent's offer. Thereafter, the question arose whether the membership would terminate the contract. It was pointed out that the Union, under the terms of the contract, would have to give the Respondent 5 days written notice of intention to terminate. Campbell told the members that they would have to make a decision whether they wanted to strike or attempt to continue negotiations. A motion was made to take a strike vote and terminate the contract. A secret ballot vote was taken which resulted in 27 votes to terminate and strike, 2 against, 2 void, and 1 abstention. On the same date, as Harry Holibaugh, the president of the Union, testified, he and two other employees notified President Newman at his home and gave him a letter written by Campbell, stating that the membership had not only rejected the Respondent's proposal but had also voted to terminate the contract effective as of midnight November 19, a Friday. Holibaugh further related that the committee told Newman that they would be available for further negotiations all week if he desired to meet with them. Holibaugh also testified that on the morning of November 18 at the plant he had a conversation with President Newman who inquired what it would take to avoid the strike. Holibaugh replied that it would take "just what we had asked for, $5 an hour," and that

Newman replied that there was no way that he could afford that. Holibaugh further testified that on November 17 or 18, he saw Nile Eddy, a member of the negotiating committee, come from President Newman's office. Later Eddy, so Holibaugh testified, "approached me after a while and told me he was going to hold another strike vote in the lunchroom; that Mr. Newman showed him the records and that he had enough trailers to run through to the month of February 1977 and that he would cancel them all and move to Florida if we went out on strike." Holibaugh testified that he told Eddy that that would be an unauthorized strike vote on Company property and that the Union could not hold a strike vote every day. According to Holibaugh, a strike vote was held in the lunchroom approximately at noon. Some twenty or twenty-five employees attended and Holibaugh "told them when they came in that this would be an unauthorized strike vote if it was taken; that I didn't think it should be taken; that we couldn't hold one every day." Eddy then stated that the matter should be put to the people and Holibaugh agreed to take a vote by a show of hands. Only one man opposed Holibaugh's position.

[4] Holibaugh was discharged on the afternoon of November 18. Upon learning of this, some eight or nine union members met at the home of Phyllis Hicks to discuss the possibility of going on strike immediately in view of Holibaugh's termination. However, Campbell, the union representative, persuaded the employees to wait until the designated time for the strike. As testified by Michael Marvin, an employee, ". . . it was pretty well said after Harry [Holibaugh] had been fired that we would go on strike." In fact, the employees went on strike November 20. On December 1, the Union wrote to the Respondent stating that it had terminated the strike effective im-

mediately and that, on behalf of all striking employees, "we hereby request reinstatement to work and made unconditional application and offer to return to work. All strikers are available and willing to return to work immediately and unconditionally." As reflected in the following table, some strikers were not recalled and with respect to others some time elapsed before they were recalled.

Employee	Department	Date Recalled
Dale Thomas	Sidewalls	Not Recalled
John Carpenter	Plumbing	Not Recalled
Robert Belknap	Partitions	February 13, 1977
Gary Woodall	Metal	Second Week of March
Pat Gentry	Metal	February 16
Charles Albertson	Welding	March
Jeffrey Schief	Partitions	Not Recalled
Donald Blankenship	Sidewalls	Early April
William Kochenour	Partitions	Terminated
Kim Schooley	Floors	February or March

President Newman testified that neither he nor any of his supervisors sent letters to employees in an effort to contact them to return to work. At least 13 new bargaining unit employees were hired by the Respondent after it received the Union's unconditional offer to return to work. It further appears that at least seven new bargaining unit employees were hired prior to mid-February. The record is unclear as to the hiring dates of the other employees for the reason that the Respondent's records failed to reflect such information.

The position of counsel for the General Counsel is that an employer violates Section 8(a)(1) and (3) of the Act when it denies [5] reinstatement to strikers who unconditionally apply therefor.[1] Moreover, he points out that the Board has held, in *Colonial Haven Nursing Home, Inc.*, 218 NLRB 1007 (1957), that the principle is well settled "that a union can make a collective offer to return to work for all striking employees" and that once such a request is made the burden is on the employer to offer reinstatement to employees for whom positions are available. Accordingly, counsel for the General Counsel contends that all unfair labor practice strikers, including probationary employees, employed prior to the strike, are entitled to immediate reinstatement.

Counsel for the General Counsel argues that the evidence clearly establishes that the strike was at least in part caused by the Respondent's unlawful conduct, including the termination of Holibaugh. He points out that prior to November 18, the employees had on two occations reaffirmed their decision to strike, but that, in both instances, these meetings were occasioned by the concern of certain employees about the initial decision to strike. It is his position that any such uncertainty was eliminated after Holibaugh was terminated, as enunciated by the testimony of Marvin, previously set forth. Moreover, he points out that at the November 18 meeting a number of employees indicated their desire to strike immediately because of the unlawful termination of Holibaugh. However, pursuant to the advice of Union Representative Campbell, such action was not taken. Counsel for the General Counsel concludes that the strike which began on November 20 was an unfair labor practice strike

1. In support of this position, he cites *West Coast Casket Company, Inc.*, 97 NLRB 820, at 823 (1951), and *Juniata Packing Company*, 182 NLRB 934, at 935 (1970).

and that the alleged discriminatees were entitled to immediate reinstatement after the Respondent received their unconditional offer to return to work.[2]

[6] C. *The Termination of Holibaugh*

Holibaugh went to work for the Respondent on May 12, 1976, as a yard man engaged in unloading trucks and supplying various departments with materials. On August 25 he was elected vice-president of the Union as well as a committeeman; on October 25 he assumed the position of president of the Union, replacing one William Hamilton, who resigned. According to Holibaugh, before he became president of the Union, his relations with Lascelles, the plant superintendent, were "real good" and that Lascelles even asked him to come down and have a few beers with him and swim in his swimming pool. However, Holibaugh testified that after he became president and had filed two or three grievances against Lascelles, the relationship "changed drastically."

On or about September 7 or 8 Holibaugh filed a grievance concerning loss of holiday pay on September 6. In it he stated that Lascelles said he would not get paid for Labor Day because he was late. He further stated that he worked 8 hours the day before the holiday and 8 hours the work day following the holiday. Holibaugh testified that Lascelles did not say too much about the grievance except to remark that Holibaugh should go

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2. In the alternative, counsel for the General Counsel states that in the event the strike should be determined to be an economic strike, the alleged discriminatees are nonetheless entitled to reinstatement. In support, he cites *N.L.R.B. v. Fleetwood Trailer*, 389 U.S. 375 (1967), where the court held (at p. 378) that "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justification,' he is guilty of an unfair labor practice" and, further, that the "burden of proving justification is on the employer."

ahead with it and that it "may go through." On October 21, Holibaugh filed two grievances. One stated that the Respondent was in violation of a provision in the contract in that Lascelles harassed employees and badgered them to work faster and harder, threatening to fire employees if they were caught out of the department, which was depriving them of bathroom rights, and threatening employees that they must work over 8 hours or be terminated. The grievance report further stated that Lascelles had fits of anger "unbecoming of the Plant Manager, that suggest physical violence to employees." The other grievance stated that the Respondent was in violation of the contract in that the plant manager refused to post job vacancies on the bulletin board, and that Lascelles had refused "to transfer seniority employees to job vacancies in the past."

Upon reading the grievances, Lascelles told Holibaugh, "Okay, I am going to give you a warning then." Holibaugh replied, "Well, one good turn deserves another", with which Lascelles agreed. Holibaugh was the only employee to file a grievance against Lascelles, which Lascelles testified he felt was unjustified.

Lascelles testified that he did not "feel good" when an employee filed a grievance against him. He added that he was sure that Holibaugh attempted to hand the grievance to him but that he did not glance at it but told Holibaugh, "give it to Newman." Lascelles further related that he had reached an accord with Holibaugh's predecessor as president concerning rescheduling union meetings to a [7] time Lascelles considered more acceptable. However, when he thereafter discussed this matter with Holibaugh in his capacity as president of the Union, Holibaugh indicated that he was unwilling to reschedule union meetings. Lascelles further testified that he was dis-

pleased about the employees' decision to strike, and that he was aware that Holibaugh was among those union representatives who strongly supported the strike and that he was joined with those who delivered the strike notice to Newman. Lascelles further testified that he considered the Union's proposals, which were supported by Holibaugh, to be unreasonable. Finally, he testified that he felt Holibaugh had been harassing him and that Holibaugh's action in filing a grievance against him may have constituted part of it. On October 21, Lascelles issued a warning slip to Holibaugh, stating that he refused to work overtime and had stated that he would not work beyond 4 o'clock. On October 29, a second warning slip was issued Holibaugh, stating that he left when he knew a truck was at the plant to be unloaded. On November 18, a third warning slip was issued Holibaugh, stating that he had missed too much work and had previously been warned. Lascelles testified that a week or two before the strike Hollibaugh "said he wasn't going to work any overtime." Lascelles related that he "told him that that simply wouldn't fit into our rules and that we did work the overtime when necessary." According to Lascelles, Holibaugh "challenged this, saying that I can't force him to work overtime." Holibaugh acknowledged that the week before the strike he had discussions with other employees concerning working overtime and "told them to use their own discretion."

Holibaugh, accompanied by Pat Gentry, on November 18, arrived approximately 20 minutes late for work. Lascelles, being aware of their late arrival, gave a disciplinary warning to Holibaugh but not to Gentry. When he started working, Holibaugh was assigned a substantial number of tasks in conjunction with excessive requests for supplies. Lascelles and Newman questioned Holibaugh throughout the day about the length of time he

spent completing the duties assigned him. Holibaugh stated he was doing the best he could in view of the number of tasks he had to perform. After lunch, Clancy Brannun, one of the supervisors of the Respondent, told Holibaugh "I don't want you in there talking to anybody about union activities." Lascelles told Holibaugh substantially the same thing, although other employees were observed conversing with each other on a regular basis. Later in the afternoon, Lascelles told Holibaugh that he was harassing him and exhibiting a "smart" attitude that day and, thereupon discharged him. The Respondent takes the position that Holibaugh was discharged because he failed to perform his job properly, sponsored an alleged slowdown during the week before the strike, and refused to work overtime. However, there is considerable testimony from employees working in various departments indicating that they were satisfied with Holibaugh's [8] job performance, including his supplying them with requested materials in a timely manner. Belknap, who was employed by the Respondent and was a member of the bargaining committee, expressed no dissatisfaction with Holibaugh's job performance. James Hutchinson, who worked in the ceiling and sidewall department, testified that Holibaugh "did a good job" in servicing his department. Hicks testified that Holibaugh "was a very good high-lift driver" and that he was "usually called two or three times at the same time."

Counsel for the Respondent, in his brief, argues that Holibaugh's "changed attitude was perhaps best exhibited," in the period leading up to the week before the strike, "in his reaction to an October 29 warning he received from Lascelles for leaving the night before rather than staying and unloading an incoming truck of materials." According to Lascelles, Holibaugh's response was to insist upon receiving the disciplinary layoff of 3 days, following which

he would "take the whole shop out." Lascelles testified that Holibaugh's work performance deteriorated after he did not receive the disciplinary layoff he requested. Lascelles stated that Holibaugh "wouldn't get the work done, and when I would say something to him, he would look at me and smile and say, well I'm trying to do my best." It is the contention of counsel for the Respondent that the efforts of Holibaugh "to reduce production took their toll on Respondent's productivity during that same period, as the labor hours required to produce the single unit increased from an average of 120 hours in August *to more than 130 hours in September, to more than 160 hours in October and more than 170 hours in November.*" Counsel acknowledges that part of this reduced productivity could be attributed to the development and production of a new type of mobile home, but as President Newman points out, the new units were only a small part of the total units produced.

Counsel for the Respondent argues that in the week immediately preceding the strike, "Holibaugh's changed attitude and efforts to impair Respondent's production manifested themselves in more obvious ways." In this connection, he points to the testimony of Paxton, who related that about 3 days before the strike, he overheard a conversation between Holibaugh and Lascelles regarding the unloading of a truck, in which "Harry said it wasn't his job to do it and he wasn't going to do it." Paxton was asked whether, before the strike, Holibaugh was performing his job at the same pace or slower or faster. Paxton stated that it slowed down prior to the week of November 14 and that "you were waiting longer to get your materials. I'm not saying it was his fault or what. It just took longer to get the material to do your job." In addition, Paxton testified that he was told by Holibaugh and Belk-

nap, a member of the bargaining committee, "to slow down and not build up any material in the plumbing department."

[9] Employee Marvin testified that he had heard the matter of a "slow down" being mentioned but did not remember who spoke about it. Lascelles testified that during the week before the strike production was down and that the plant "did not have the material delivered to the areas." He further related that he observed Holibaugh "many times" talking to people in the shop. Lascelles testified that it was the responsibility of Holibaugh to see to it that the necessary materials were delivered into the departments. Counsel for the Respondent argues that during the week preceding this strike and for sometime theretofore, Holibaugh "was just not doing his job." It is his position that this accounted for the unusual number of calls on the plant's public address paging system for Holibaugh.

On November 18, in the afternoon, so Lascelles testified, he sought out Holibaugh to move some units off the end of the production line with a tractor. According to Lascelles, after he had made several efforts and urgings that Holibaugh do that job, Holibaugh moved the first unit "about as slow as possible to move." Lascelles then decided to talk to Holibaugh by riding with him on the back of the tractor while he moved the second unit. Lascelles related that he asked Holibaugh why he was not getting the job done and that Holibaugh's response was to bring up the subject of the imminent strike and, so Lascelles testified, Holibaugh said "that I had better watch out when the strike started, because the big boys from flooring are going to bust some heads." Lascelles inquired whether that was a threat and Holibaugh's response was that it was not. Lascelles related that when they got to the coach yard

he again urged Holibaugh to get the work done and that Holibaugh's response was that he "wasn't going to bust his ass." At that point, Lascelles told Holibaugh that he might as well go home. Lascelles confirmed to Holibaugh that this meant that he was fired.

The Respondent argues that Holibaugh was discharged because he failed to perform his job properly, sponsored a slowdown during the week prior to the strike, and, in addition, refused to work overtime. However, there is testimony from employees in several departments indicating they were satisfied with Holibaugh's job performance in that he supplied them with requested material in a timely fashion. Thus, Tom Farley who, when he was employed in April 1976 and in November of that year worked in the ceiling department, testified that Holibaugh would supply materials to his department, that in several weeks prior to the strike Holibaugh "was being called to the office to empty the waste baskets and to clean the lunchroom and was harassed, doing different sorts of things." He related that Holibaugh "did a good job" in supplying his department with various materials. Hicks testified that Holibaugh "was a very good high lift driver," and that he was "usually called two or three times at the same time."

[16] Counsel for the General Counsel points out that any drop in production, as indicated by an exhibit introduced by the Respondent, occurred in October as well as November, "long before the employees had determined they would go on strike." He further points out that one important factor causing a drop in productivity resulted from the production of units for Hill Ren, and that Lascelles admitted that the standards to be met, as well as the complexity of these units, substantially exceeded those of the units otherwise produced by the Respondent, and that the time and hours required to produce these units con-

siderably exceeded that required for normal units. Moreover, one of the serious problems with these units involved plumbing, and Lascelles testified that three employees working in the plumbing department, all of whom had signed a petition to resign from the union rather than go on strike, a factor which indicated their intention not to engage in the strike. He contends that their actions, which quite clearly affected the productivity factor, "markedly refutes Respondent's argument regarding the sponsored slowdown, inasmuch as they were not supporters of the union or Harry Holibaugh." Moreover, he contends that these employees were being assigned substantial amounts of overtime to complete the units in view of the likelihood of a strike and, therefore, "fatigue would also contribute to a lower productivity factor in November, 1976."

D. *Surveillance*

During the hearing I permitted counsel for the General Counsel to amend the complaint to include an allegation that the Respondent, on or about November 18, through President Newman, engaged in surveillance of a meeting of employees engaged in union activity at the home of an employee in Edgerton, Ohio. The only evidence introduced was the testimony of Union Secretary Hicks, who related that an unplanned meeting of seven or eight employees took place at her home on the evening of November 18. She had been home ill that day and a group of employees came to her door in the late afternoon. While the meeting was in progress, Hicks went to her living room window to see if anyone else was coming to the meeting and she noticed a red and white Lincoln Continental going down her street. Later, as Hicks was preparing to retire, she saw the same automobile go past her house. She did not see the driver because it was dark. She knew that Newman owned a red and white Lincoln Continental and that a

neighbor across the street was a friend of Newman's and did business with the Respondent. Newman testified that he lives in Edgerton but that on the evening of November 18 he was at home attending a surprise birthday party given for him by his children and that he was not out in his automobile that evening in the housing development where Hicks lived and that he was unaware that the employees were having a meeting that night.

[11] E. *The Nature of the Strike*

As related above, the position of counsel for the General Counsel is that the evidence clearly establishes that the strike was at least in part caused by the Respondent's unlawful conduct, including the termination of Holibaugh. Accordingly, he argues that the strike which began on November 20, was an unfair labor practice strike and that the alleged discriminatees were entitled to immediate reinstatement after the Respondent received their unconditional offer to return to work.

On the other hand, counsel for the Respondent argues that when the Union employees left their membership meeting on the night of November 14, they "had overwhelmingly voted, and were thus committed, to strike Respondent beginning midnight November 19-20, 1976." It appears that the employees were aware there was no further bargaining room and, as Belknap testified, they made no effort to seek the assistance of the Federal Mediation Service. No further bargaining sessions were held during the remaining days before the strike and, in addition, no official union membership meetings were held. At a meeting of union members at the home of Denny Sanders, an officer of the Union, on November 17 Sanders attempted to persuade the employees not to strike but was unsuccessful by a vote of 24 to 6. At about noon on November 18,

Eddy, also a union officer, endeavored to have a group of employees meeting in the lunchroom to revoke the strike issue. As related by Holibaugh, the vote of 20 to 25 employees was only 1 short of unanimous in support of striking. As previously noted, the major issue separating the parties was the commitment of the Union to a $5 per hour wage demand and the unwillingness of the Respondent to meet it.

Union Representative Campbell testified that after Holibaugh's discharge some eight or nine employees met at the home of Hicks and they discussed the question of striking immediately because of Holibaugh's termination. Campbell testified that he advised against it and stated that it they were going to strike the members had agreed to strike effective on November 20. According to Campbell, the members present were concerned because Holibaugh had been terminated and he related that they "wanted to set up the picket lines right then." Campbell testified that the strike started about 10 minutes after midnight on Saturday morning.

On the other hand, counsel for the Respondent argues that the strike was caused by the bargaining impasse. In support of this contention, counsel points to the testimony of former employee John Carpenter, who worked for the Respondent from about the latter part of September until the strike began. He points to the following question asked by counsel for the General Counsel and the answer Carpenter gave:

> [12] Q. Excuse me. Were there any other reasons besides in addition to the working conditions you referred to that caused employees to go out on strike?
>
> A. Not to my knowledge besides asking for a little bit more money.

In addition, he points out that the foregoing evaluation of the cause of the strike "was confirmed by the picket signs used by the striking employees during the strike. They simply indicated that the local Union was on strike and said nothing else."

Between November 13 and 15, Jan Piper, an employee, had a conversation with Newman in his work area. Newman inquired if Piper would be working during the strike and the latter replied that he probably would. Employee Eddy, who was not sympathetic to the position of counsel for the General Counsel, testified that in a conversation he had with Newman on November 18, the latter told him that if the employees went on strike he would probably have to close the plant after inquiring of Eddy if the employees were going to go on strike. In addition, on the Monday preceding the strike Newman told Paxton, an employee that he would have to close the plant before agreeing to the Union's wage proposal. Counsel for the General Counsel points out that it is "noteworthy" that after Eddy met with Newman in his office on November 18, Eddy made an unsuccessful attempt to convince the employees not to engage in a strike and, he contends, this "was undoubtedly in response to Newman's conversation with him, inasmuch as Eddy was admittedly originally in support of the strike and delivered the notice to strike Newman."

During the week of November 14, Kenneth Brown, an employee, had a conversation with Newman in which the latter asked him if he was going to work during the strike. Also in November, so employee Dennis Sanders testified, while he was at the plant Newman asked him whether or not he was going to strike and Sanders replied, "Yes, it looks like it." In addition, Sanders related that the inquiry made of him may have been made in

the presence of other employees and that during the conversation Newman discussed the possibility of removing the Union and also made a statement that the bargaining committee of the Union was composed of "deadbeats!"

According to Robert Belknap, an employee, Newman approached him about November 18 and asked Belknap if he was having any problems getting materials; Belknap replied that he did not have any problems. According to Belknap, Newman then asked him what he thought about the Union and Belknap replied that he considered it good for both the Respondent and the employees. Newman then stated that he didn't mean that, but referred instead to the bargaining situation. Belknap, so [13] he testified, told Newman that be believed the proposals of the Union were reasonable. Newman replied that in his opinion $5 an hour was unreasonable and that he could not afford to pay it and then he inquired of Belknap what he thought about working under a "gentlemen's agreement" and going non-union, stating that the gentlemen's agreement would be effected if and when the employees went out on strike. Belknap responded in the negative and stated that he took an oath when he joined the Union. Newman then told Belknap that he would make it worth his while if he would stay but Belknap replied in the negative. In addition, Newman told Belknap that Eddy had been up in his office and was shown cancelled orders which resulted from Newman's inability to fulfill the agreements because of the strike; in addition, Newman told Belknap, "If you folks go out on strike, I have a whole new crew coming in Monday, including from my other plant." In addition Newman told Belknap that ". . . there would be a piece of paper coming around the shop for people to sign that would stay on and work, and if I cared to sign it and change my mind, there would be a paper floating

around to sign." According to Belknap, Newman telephoned him on November 19, and asked if he had reconsidered the proposal Newman had given him. Belknap testified that he still rejected the proposal, whereupon Newman told him that he would not have to worry about crossing the picket line inasmuch as he would be protected and assisted in crossing it and, in addition, he told Belknap that the latter was being unfair to his family and reminded him Thanksgiving was near.

According to Gary Woodall, an employee, Newman approached him several times on or about November 18, and asked him what his position was regarding the strike. Woodall testified that he told Newman that he did not care and walked away. Woodall related that Newman made his inquiry of him two or three times during the day. In addition he stated that normally Newman would come through the plant once or twice a week and say "hello" but during the week prior to the strike Newman was in the plant every day "just about."

F. *Promises of Benefits, Direct Dealing, and Suggestions of Resignation from the Union*

Hicks testified that on November 13 Newman came into the cabinet shop and told her, "If we did not have a Union, he could afford to pay some of them better wages than the rest." Also that day Newman told Hicks that he had offered the employees a just and fair contract and also told her that she would have to withdraw from the Union in order to avoid being fined.[3]

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3. At the time, there was considerable discussion among the employees concerning the matter of being fined $500 by the Union if they crossed the picket line. Newman also her [sic] that she would have to withdraw from the Union in order to avoid being fined, and that he would bring her across the picket line.

[14] During the week before the strike Newman had several conversations with Dennis Sanders, an employee, in which Newman discussed the piece rate base on 7-1/2 percent of the invoice which he favored. Newman also told Sanders of the wages employees would be receiving if they worked during the strike. In addition, Newman discussed the possibility of removing the Union from the Respondent and told Sanders that if the employees drafted a petition with 10 signatures they could vote on removing the Union. In addition, Newman told Sanders, "We could form our own union." Sanders testified that he asked Newman what the base rate would be and was told that it would be $4.10 for those there a year, $3.65 for those under 6 months, and $3.85 for those who had worked for 6 months to a year.

Nile Eddy, an assistant supervisor at the time he testified, testified that he had a conversation on the morning of November 18 with Newman in the latter's office concerning the reasonableness of the monetary proposals of the parties. During that discussion, Newman stated, "Well, if you weeded out the bad guys, maybe I would pay the money" that had been requested by the Union during the negotiations. On the same day, Newman initiated a conversation with Belknap, during which he asked Belknap what the latter thought about the Union. Belknap stated that it was good for both the Respondent and the employees and, thereupon, Newman stated, "No, he didn't mean that, he meant on the bargaining, what we were negotiating for." Belknap stated that the proposals were fair and reasonable and Newman responded that $5 per hour was not fair because it would break him and that, "A lot of the employees would slack off and not work if they were getting $5 an hour." Newman then told Belknap that there would be an injunction denying him access to the Respondent's property without permission.

Belknap then asked Newman, "In talking to Nile [Eddy] and Sanders, why didn't you call the entire committee into the lunch room and inform them of what he had informed Eddy and Sanders." Newman replied that he was glad Belknap brought that up "because I will tell you like I told them. I can make it worth your while if you withdraw from the Union and stay in the shop and work instead of going out on strike." Belknap replied that he could not do that. Newman then stated, "Well, you're not going to hurt me." Newman also told Belknap that a piece of paper would be circulating throughout the shop for the signatures of employees if he or others decided to withdraw their support of the Union.

On November 18, Newman had a conversation with Holibaugh and asked him what it would take to end the strike and settle the matter. Holibaugh replied that it required agreement on a $5 per hour wage rate. Newman told Holibaugh that he could not afford to pay that rate.

[15] On the Monday before the strike, employee Paxton and two other employees, Stantz and Beatty, who were not members of the Union's negotiating committee, were involved in a conversation with Newman. Newman told them that he was willing to pay employees $4.10 an hour although the Union was unwilling to accept that proposal. Newman also told them he would pay them that hourly rate during the strike, and that these employees would resign from the Union and form their own separate labor organization.

Gwen Mihuc, employed in the final finish department, testified that on November 19, when Miller was acting supervisor for that day, Miller came into the trailer where she was working and stated that "our Union wasn't any good and that we should quit the Union and start our own, because all it was doing was costing us money, and he

said they were going to close the plant down; that him and Jim Newman were going to go to Florida and buy a condominium." She further related that Miller "said there would be all new people working there in March; that none of us would be working there, and they had enough people to build trailers without us."

Charles Albertson, an employee, testified that, on or about November 17, he had a conversation with Plant Superintendent Lascelles, in which Lascelles inquired whether Albertson intended to engage in the strike and told Albertson that he had had no problems crossing picket lines in other strikes. Albertson told Lascelles that he was not a welcher and was going to go out on strike. On or about November 19, Newman approached Albertson and told him that he was not going to meet the Union's demands and that he was planning to take a trip to Florida and intended to close down the plant in December. Newman also advised Albertson that while the employees were out on strike they would not be drawing unemployment compensation and could starve as far as he was concerned.

G. *Interrogation and Threats of Reprisal*

Hicks related that during the third or fourth week of October Newman came to her in the cabinet shop and talked to her about the contract he had offered the employees, stating that he thought it was a fair contract. Hicks replied that she did not think it was a fair contract. Hicks replied that she did not think it was really fair because the wages weren't too much different than what had been in the contract. Newman stated that he could not afford to pay $5 per hour and that he "would have to close his doors first because he would go bankrupt." Hicks further related that on or about November 13, Newman approached her in the cabinet shop and asked her

in the event of a strike whether she would cross the picket line. She replied that she would not bring her automobile across the picket line. Newman further stated, according to Hicks, "that if we did not have the Union, he could afford to pay some of them better wages than the rest" and that he or one of the supervisors would bring her across the picket line, on at least two occasions that day.

[16] Miller, the Respondent's director of marketing, approached Hicks on either November 15 or 16 in the cabinet shop and initiated a conversation with her which was corroborated by employee Darlene Dangler. Miller asked Hicks if she would cross the picket line in the event there was a strike and she replied that she would not. Miller, in addition, told Hicks that if she would stay away from the picket line she would not have to worry about losing her job. Hicks, in addition, testified that on November 18, while attending a union meeting at her home, she observed a red and white Lincoln Continental slowly drive by her house on at least two occasions and that she was aware that one individual in her community namely, Newman, had a red and white Lincoln Continental. She further related that in the event Newman was visiting the home of a Mr. Showalter, on the same street, there would be no reason for his passing her house on either arriving at the Showalters or leaving, by reason of the fact that the only exit and entrance to her street as well as to the Showalter home is north of her house as well as that of Showalter.

H. *Unilateral Changes*

In March 1972, the Respondent recognized the Union as the exclusive collective bargaining representative of its production and maintenance employees at its Bryan, Ohio facility. It entered into a collective bargaining agreement with the Union on November 13, 1973, which

extended through November 14, 1976. During the summer of 1976, the Respondent's employees exhibited a growing interest in the Union, as shown both by increased attendance at more frequently held meetings of the Union, as well as the decision of the membership to charter a separate local, which took place in August or September 1976. After contract negotiations broke down on November 12, 1976, the employees voted in favor of striking on at least three occasions during the week preceding the strike. On December 10, the Union sent the Respondent a letter requesting that it meet as well as seeking information concerning the name, date of hire, address, and the rate of pay to each employee and the department in which they worked. In addition, the Union reminded the Respondent that it was to continue to deduct dues from the employees and to submit them to Treasurer Hicks as well as a list of the employees from which dues were deducted. The Union stated it was prepared to continue contract negotiations and offered the dates of December 21, 22, 23, 1976, and requested that the Respondent to advise as soon as possible whether these dates were agreeable. Under date of December 17, counsel for the Respondent acknowledged receipt of the Union's December 10 letter, stated that he was involved in the negotiation of five different labor agreements at that time and suggested that Campbell give the firm a call sometime after the first of the year to make arrangements for any further negotiating meeting. In addition, he stated that a December 14, letter of Newman, which stated the Respondent was not compelled to [17] take dues out of the wages of employees, that the check-off authorizations previously relied upon by the Respondent for such deductions terminated with the expiration of the contract. He further advised that "unless and until new and current authorization cards are provided to the Company, it cannot lawfully deduct any moneys

from employees wages." In addition, Newman testified that he never informed the Union at any time material that he entertained a good faith doubt regarding the status of the Union as the exclusive bargaining representative of the Respondent's employees. Counsel for the General Counsel contends, therefore, that "it is indisputably clear that Respondent did not harbor any good faith doubt regarding the Union's status as exclusive bargaining agent of its employees in December 1976 (subsequent to the Union's request for information), in view of its express willingness to continue negotiating with the Union." It is the position of counsel for the General Counsel that the Board has long held that "an Employer may not lawfully withdraw recognition from an incumbent union because of an asserted doubt of the union's continued majority unless its assertion is raised in the context free of unfair labor practices, and is supported by a showing of objective consideration providing reasonable grounds for belief the majority of the employees no longer desire union representation." In support he cites *Cantor Bros., Inc.*, 203 NLRB 774, at page 778 (1973). In the same case the Board held that the employer's assertion of good faith doubt concerning the union's majority "must be based on objective considerations and the Employer's mere assertion of it on proof of the Employer's subjective state of mind is insufficient." Accordingly, counsel for the General Counsel asserts that in spite of the fact that Newman testified he had heard some statements of certain employees indicating their dissatisfaction with the Union, "such evidence does not legitimatize an employer's failure to bargain in good faith with the union." Moreover, it is the position for counsel for the General Counsel that although the Respondent contends that certain employees indicated their unwillingness to engage in the strike and its observance of some striking employees returning to

work, such evidence, again citing the *Cantor* case (at p. 779) "does not give rise to a presumption that the employees have repudiated the Union as their bargaining representative." Furthermore (again citing the *Cantor* case) counsel for the General Counsel states that in that case the Board stated that an employer could not "rely on either the refusal of some employees to go on strike or the return of striking employees to work as a basis for withdrawing of recognition from the Union."

Counsel for the General Counsel further notes that the Respondent contends that for some time after the Union was organized it was not deducting employees' dues despite a check-off clause and requests by the Union. However, he points out that from at least June to November 1976, union dues were deducted. In his view, the nonpayment of dues does not constitute a reasonable basis for contending an employer has a good faith doubt of the union's majority status, citing *C & C Plywood Corporation and Veneers Inc.*, 163 NLRB 1022, 1028 (1967), and *Mid-Continental Refrigerated SVC, Co.*, 228 NLRB No. 98 (1977).

[18] As previously noted, there was some discussion among the employees to the effect that the Union might levy a $500 fine against any member who crossed the picket line. Newman pointed out to employees that the Union would be unable to fine anyone who resigned from the Union. Under date of November 29, 13 employees signed a document which stated: "The following people do not wish to be represented by Roy Campbell or Local 712 Allied Industrial Workers of America,"[4] Employee Piper

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4. Although 13 names appear on the petition, counsel for the General Counsel points out that two persons, Kochenour and Thomas, engaged in the strike and then "repudiated their decision to resign from the union." He points out of 40 members in November 1976 "a mere eleven of forty names cannot reasonably constitute a basis for Respondent's belief that the union no longer represented a majority of the employees."

was involved in the drafting of this petition. It is his uncontradicted testimony, which was corroborated by Edna Ellis, Newman's secretary and office manager. She testified that she typed it on Respondent's stationery utilizing a typewriter in the Respondent' office. In addition, she typed an envelope addressed to the Union which she gave to Piper along with the petition. The metered postage affixed to the envelope was supplied by the Respondent and the petition was circulated on company time throughout the plant. Counsel for the General Counsel contends that this "tainted" petition estops the Respondent from characterizing the petition as an objective consideration for challenging the Union's status as "the collective bargaining representative of its employees." Moreover, counsel for General Counsel contends that the Respondent engaged in other unfair labor practices in an effort to discourage employees from striking and supporting the Union. Accordingly, he argues that the Respondent "is foreclosed from raising any legitimate good faith doubt" as to the Union's continuing majority status in view of the fact that "the atmosphere was far from free of any unfair labor practices." Accordingly, he concludes that, in view of the foregoing, "it is apparent that Respondent neither harbored any good faith doubt regarding the union's majority status at any times material herein nor raised legally sufficient objective considerations to justify its failure to bargain in good faith with the Union."

I. *Discussion and Conclusions*

We turn first to the matter of the recall of strikers following the Union's December 1 notification that the strike was terminated and that all strikers desired reinstatement and unconditionally applied to return to work immediately. As reflected in a preceding portion of this decision, of the ten employees involved three were not re-

called, one was terminated, and the balance were recalled in February, March or April. Moreover, the Respondent sent no letters to the employees in an effort to contact them to return to work and, more importantly, at least 13 new bargaining unit employees were hired by the Respondent after it received the Union's unconditional offer to return to work and, in addition, at least 7 new bargaining unit employees were hired prior to mid-February.

[19] While it is recognized that during the winter months the Respondent's business is at a lower level, no evidence was introduced with respect to layoffs during prior years in the winter months. In view of that circumstance, and particularly considering the fact that 13 new bargaining unit employees were hired by the Respondent following receipt of the Union's unconditional offer to return to work, and that 7 new unit employees were hired before the middle of February, I conclude and find that the Respondent thereby violated Section 8(a)(1) and (3) of the Act. Moreover, I am persuaded that the strike was at least in part caused by the Respondent's unfair labor practices, including the termination of Holibaugh. Although Holibaugh may not have been an exemplary employee, the record, including the testimony of fellow employees to the effect that he serviced them with materials promptly, I am persuaded that the Respondent terminated Holibaugh at least in part because of his union membership and activity.

With respect to the allegation that the Respondent engaged in surveillance of a meeting of employees, I am of the view that the evidence is insufficient to support this allegation.

Although counsel for the Respondent argues that the strike was brought about by an impasse in collective bargaining negotiations, I believe and find that the Respon-

dent's course of conduct, including the termination of Holibaugh, was a substantial cause of the strike. Accordingly, I find that the Respondent's unfair labor practices were a substantial cause of the strike. Moreover, I find that the Respondent's failure and refusal to provide the Union with relevant information in order that it could fulfill its responsibility as the exclusive bargaining representative of the Respondent's employees, constitute a violation of Section 8(a)(1) and (5) of the Act.

I further find that the Respondent made promises of benefits to employees, and engaged in direct dealings with them rather than negotiating with the Union, their exclusive representative. In addition, I find that the Respondent made suggestions to employees that they should resign from the Union and form their own organization.

I also find that the Respondent engaged in unlawful interrogation of employees and threatened them with reprisals because of their union membership and activity.

Finally, I find, as set forth above, that the Respondent made unilateral changes in the terms and conditions of employees.

To summarize, I conclude and find that the Respondent engaged in conduct violative of Sections 8(a)(1), (3) and (5) of the Act in the manner set forth above, and that such conduct requires that the Respondent take appropriate remedial action.

[20] Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By not recalling Dale Thomas, John Carpenter and Jeffrey Schief, and by terminating William Kochenour, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By delaying the recall of strikers until February, March or April 1977, following the Union's unconditional application on their behalf on December 1, 1976, while at the same time hiring new bargaining unit employees, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Harry Holibaugh on November 18, 1976, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By making promises of benefits to employees, dealing directly with them rather than with the Union, their exclusive representative, and suggesting to employees that they resign from the Union, the Respondent violated Section 8(a)(1).

7. By failing and refusing to bargain collectively with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

8. By questioning employees concerning their union membership and activities and by threatening them with reprisals, the Respondent violated Section 8(a)(1) of the Act.

9. By making unilateral changes in the terms and conditions of employment of its employees the Respondent violated Section 8(a)(1) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

11. The Respondent has not engaged in unlawful surveillance of meetings of the Union.

The Remedy

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom [21] and take certain affirmative action designed to effectuate the policies of the Act. It will be recommended that the Respondent offer immediate and full reinstatement to their former position, and if not available, to an equivalent position, without prejudice to their seniority and other rights and privileges, and make each whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he would have earned from the date of the failure to recall or the termination, as the case may be, to the date of the offer or reinstatement, consistent with Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest on backpay to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

With respect to those strikers who were not recalled until February, March or April, a problem arises as to when they should have been recalled. Bearing in mind that the Union made unconditional application in their behalf on December 1, 1976, it appears to me that no undue hardship would be suffered by the Respondent if the date of December 15, 1976, is fixed. My recommended Order will so provide.

A further problem arises with respect to the backpay due. Insufficient evidence was introduced regarding employee earnings. In my opinion, an appropriate measure would be the record of earnings for January through October 1976, which should then be applied to the period

from December 15, 1976, to the date the employee was recalled.[5]

Counsel for the General Counsel asks that interest on backpay be fixed at 9 percent. I do not believe that I have authority to so provide; in my view, any such departure from the current policy should be taken by the Board.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[6]

[22] ORDER

The Respondent Mobile Home Estates, Inc., Bryan, Ohio, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to reinstate any employees to their former or substantially equivalent positions of employment for the reason that they joined or assisted the Union and/or engaged in other protected or concerted activities.

(b) Making promises of benefits to employees directly, engaging in direct dealings with employees rather than negotiating with the Union, their exclusive representative.

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5. It would appear to me that employee timecards would establish the precise date of recall. If not, with respect to Woodall the date is fixed as March 15, 1977; for Albertson, March 15; for Blankenship, April 10, and for Schooley, March 1.

6. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Suggesting to employees that they resign from the Union and form their own organization.

(d) Questioning employees or threatening them with reprisals because of their union membership and activity.

(e) Making unilateral changes in the terms and conditions of employment of its employees.

(f) Failing or refusing to bargain collectively with the Union.

(g) Terminating or otherwise discriminating against any employee because of his union membership or activity.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Harry Holibaugh, Dale Thomas, John Carpenter Jeffrey Schief, and William Kochenour immediate and full reinstatement to their former or substantially equivalent positions.

(b) Make the foregoing employees whole for any loss of earnings they may have suffered by reason of Respondent's unlawful discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, reports and all other records necessary to analyze the amounts of backpay due under the terms of this recommended Order.

[23] (d) Post at its offices and places of business in Bryan, Ohio, copies of the attached notice marked "Ap-

pendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 8, in writing within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. September 29, 1978

/s/ IVAR H. PETERSON
Ivar H. Peterson
Administrative Law Judge

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7. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "poster by order of the national labor relations board" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

No. 83-492

In the Supreme Court of the United States

OCTOBER TERM, 1983

MOBILE HOME ESTATES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with a previously recognized union without having a reasonably-based good faith doubt as to the union's majority support among petitioner's employees.

2. Whether the Board acted within its discretion by ordering petitioner to recognize and bargain with the union as a remedy for petitioner's violation of Section 8(a)(5) of the Act, notwithstanding the time elapsed between the violation and entry of the order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 707 F.2d 264. The decision and order of the National Labor Relations Board (Pet. App. A4-A94) is reported at 259 N.L.R.B. 1384.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1983. On August 15, 1983, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 21, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. Petitioner manufactures and sells mobile homes at its plant in Bryan, Ohio. In March 1972, petitioner voluntarily recognized the International Union, Allied Industrial Workers, AFL-CIO and its Local 712 (the Union) as the exclusive bargaining representative of its production and maintenance employees after a majority had signed valid union authorization cards (Pet. App. A14-A15, A74; C.A. App. 63). Petitioner and the Union entered into a three-year collective bargaining agreement in November 1973. The contract contained a dues checkoff authorization clause and a provision that employees in the unit were to become members of the Union after 30 days. Checkoff authorization cards apparently were not provided until more than a year after the contract commenced, but employees eventually signed cards and union dues were deducted on a monthly basis (Pet. App. A23).

During the summer of 1976, a few months before expiration of the initial collective bargaining agreement and just prior to commencement of negotiations for a new contract, there was an upsurge of employee interest in the Union and members began to hold monthly meetings. The employees, who prior to 1976 belonged to an amalgamated local union with offices elsewhere, sought and were granted their own local by the Union's international organization. The new local elected officers, stewards and a bargaining committee in August 1976. Pet. App. A23.

Petitioner and the Union began negotiations for a new contract in October. Meetings were held on five

occasions. The Union negotiating committee rejected petitioner's final offer but agreed to submit it to a vote of the membership. Pet. App. A24. At a local meeting on November 14, 1976, that was attended by 32 employees, the company's proposal was rejected by a vote of 31 to 1.[1] A strike vote followed. The vote tally showed 28 in favor of striking, 2 opposed and 2 abstaining. Pet. App. A25. The margin was the same in two subsequent strike votes taken on November 17 and November 18 (Pet. App. A77).

On November 13, one week before the strike was to begin, petitioner's president, James Newman, interrogated employee Phyllis Hicks about her willingness to cross a picket line in the event of a strike. He also told her that the company could afford to pay higher wages if there was no union. Pet. App. A27. Hicks initially indicated a willingness to cross the picket line, but later told Newman she would not do so. Newman offered to drive her across, but Hicks repeated that she would not cross a picket line. *Ibid.* On November 19, the day before the strike, Newman told employees Sanders and Paxton that they could resign from the Union and form their own union if they wished to avoid being fined by the Union for working during the strike (Pet. App. A56-A57). Newman told a number of other employees that they could not be fined for crossing the picket line if they were not members of the Union (Pet. App. A28). Finally, Steve Miller, a supervisory employee of petitioner, told employee Gwen Mihuc on November 19 that the Union was "not any good" and cost members money, and that they should resign and form their own union (Pet. App. A51).

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[1] Petitioner employed 40 employees in its production and maintenance unit during the fall of 1976 (Pet. App. A22).

The strike lasted from November 20 to December 1, when it was terminated by a vote of the employees (Pet. App. A25). The Union made an unconditional offer to return to work on behalf of all striking employees. At least 12 of the strikers were not reinstated immediately following the strike; although some eventually returned to work, others were never asked to return. *Ibid.*

Following the end of the strike, on December 10, 1976, the Union sent a letter to petitioner requesting a list indicating each employee, his or her hiring date, address, rate of pay, and department. The Union also requested continuation of its dues checkoff and stated that it was willing to resume negotiations on December 21, 22 or 23. In response, company president Newman indicated that petitioner would no longer deduct union dues; he enclosed a list showing only amounts deducted during November. On December 17 the Union repeated its request for the information previously sought and for resumption of negotiations. That same day, petitioner's counsel wrote that he would be unable to meet on the dates proposed; he suggested that the Union call him in January 1977 to arrange a substitute date and repeated that dues would no longer be deducted, contending that the authorizations expired with the old contract. There was no further contact between the parties. The Union filed unfair labor practice charges on December 27, 1976. Pet. App. A25-A26. A complaint was issued.

2. In the proceedings before the Board, petitioner contended that it withdrew recognition from, and refused to bargain with, the Union based on its belief that the Union no longer represented a majority of its

employees.[2] According to petitioner, it had formed this belief based upon alleged union inactivity, lack of support for the strike, and employee turnover.[3] The

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[2] An administrative law judge (ALJ) conducted a hearing during May and June 1977. Following his decision in September 1978 (Pet. App. A101-A135), the Board remanded for additional findings (Pet. App. A97-A100). The ALJ retired before issuing supplemental findings. The Board subsequently approved a stipulation entered into by the parties that the case be decided by a new ALJ based on his review of the original record and briefs, and his own findings of fact and credibility resolutions independent of the decision of the original ALJ (Pet. App. A5 n.1). The new ALJ issued his decision in March 1981 and the Board substantially adopted his findings and conclusions with respect to the matters here at issue on February 4, 1982 (Pet. App. A9, A13).

[3] At the hearing before the ALJ, petitioner's president Newman gave only three reasons for refusing to bargain with the Union: 1) the Union went on strike and was without a contract at the time of the hearing; 2) the strike commenced with only a few pickets and the number dwindled during the strike; and 3) Newman had received a list of employees who had resigned from the Union (Pet. App. A74). In a post-hearing brief petitioner listed 13 reasons for its alleged doubt as to the Union's majority status (Pet. App. A74-A76): 1) the Union was voluntarily recognized in 1972; 2) it did not achieve a contract with petitioner until November 1973; 3) the contract contained a union shop clause and dues check-off provision but authorizations for dues deductions executed by employees were not provided to petitioner until June 1975; 4) employees did not establish their own local until 1976; 5) less than a majority of employees, on average, attended union meetings in 1976; 6) union officers were appointed rather than elected; 7) four of the seven local officers resigned from the union during negotiations or before the strike; 8) 13 employees signed a document indicating their resignation from the union, a copy of which was provided to petitioner's president; 9) 13 or 14 union members worked during the strike; 10) the strike lasted for only seven workdays and

ALJ, whose decision was adopted by the Board, found that petitioner's purported reasons, "taken singularly or considered together," did not support a reasonable good faith doubt of continued majority support or negate the concrete evidence that a majority of employees supported the Union during and after the strike (Pet. App. A77).

The ALJ noted that petitioner's allegations of union inactivity related to events that occurred prior to the time at which petitioner refused to bargain. While considering these facts as background, the ALJ found that they "really have nothing to do with the majority status of the Union in 1976" (Pet. App. A76).

Nor did the resignations that petitioner relied upon justify its actions.[4] The ALJ found (Pet. App. A77):

> [I]n the formal strike vote taken prior to the strike by the Union, the members voted to strike by 28 to 2, with 2 voids or abstentions. The margin was nearly the same in the two other votes which took place on November 17 and 18, with more than a majority of the employees then employed voting to strike.
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> Even if we were to grant that the 13 resignations were all authentic and continued in force, despite testimony to the contrary on two of them, it would still be mathematically clear that the

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only 10 to 12 employees attended the union meeting terminating the strike; 11) the company did not meet with or make concessions to the Union during the strike; 12) only 14 of 40 bargaining unit employees had more than six months of service with the company in November 1976, and almost all of them worked during the strike; and 13) petitioner's work force historically experienced high turnover and fluctuated widely in size.

[4] See page 5 note 3, *supra*.

> Union represented a majority of the employees at the time of the strike. There is no evidence which credibly demonstrates a shift of employee sentiment to opposing the Union during or after the strike. The employees who did not resign from the Union must, under the present evidence, be presumed to still have supported the Union during and after the strike.

The Board found that petitioner's refusal to bargain and to provide information requested by the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and directed petitioner to recognize and bargain with the Union (Pet. App. A4-A9, A91, A93).

3. In a brief per curiam opinion the court of appeals found that the "decision of the administrative law judge * * * reflects a thorough and conscientious canvassing of the record" and that the Board correctly decided the issues pertinent here (Pet. App. A3). The Court upheld the Board's finding that petitioner had unlawfully refused to bargain with the Union and enforced the Board's bargaining order, rejecting petitioner's contention that the order to bargain should not be enforced because of the time elapsed between the events that gave rise to the proceeding and the issuance of the order (Pet. App. A3).[5]

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[5] The Board had also found that petitioner violated Section 8(a)(1) of the Act by disparaging the Union and urging employees to resign and form their own union, by interrogating employees concerning their willingness to cross a picket line, and by telling employees that petitioner could afford to pay better wages if they did not have a union (Pet. App. A8, A91-A92). Petitioner did not contest these findings in the court of appeals, and they are not before this Court.

In addition, rejecting the ALJ's recommendation to this extent, the Board had found that petitioner violated Section

ARGUMENT

1. Petitioner does not dispute the settled propositions that majority support is presumed to continue following certification or voluntary recognition of a union, that absent unusual circumstances the presumption is irrebuttable for a period of one year, and that the presumption may thereafter be overcome only if the employer shows that the union actually lacked majority support or that the employer had a reasonably-based good faith doubt of majority support at the time of the refusal. See *Bellwood General Hospital* v. *NLRB*, 627 F.2d 98, 102 (7th Cir. 1980); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *NLRB* v. *Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978).[6] Nor does petitioner dispute

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8(a)(3) and (1) of the Act by refusing to reinstate two strikers upon their unconditional offer to return to work (Pet. App. A7-A8). The court of appeals found that the Board's conclusion was unsupported by the record and denied enforcement of that portion of the Board's order directing that an offer of reinstatement be made to the two employees (Pet. App. A3). The reinstatement issue is not before this Court.

[6] A similar presumption of majority status, undisputed by petitioner and equally applicable here, arises when an employer and union enter into a collective bargaining agreement of three years or less duration. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 290 n.12 (1972). Absent special circumstances, the presumption is irrebuttable for the duration of the agreement and is rebutted upon expiration of the agreement only by a showing that the union is in fact in the minority or that the employer has a reasonably-based good faith doubt of its majority support. *Bellwood General Hospital*, 627 F.2d at 102; *Pioneer Inn Associates* v. *NLRB*, 578 F.2d 835, 838-839 (9th Cir. 1978).

Petitioner does not contend that the Union actually lost its majority status (see Pet. 5-6, 17).

the equally settled rule that the employer's good faith doubt must be proved by evidence of objective facts " 'sufficient * * * to cast serious doubt on the Union's majority' " (*Bellwood General Hospital*, 627 F.2d at 102 (quoting *Tahoe Nugget, Inc.*, 584 F.2d at 297 n.13); see also *Orion Corp.* v. *NLRB*, 515 F.2d 81, 85 (7th Cir. 1975)). Rather, petitioner contends that the Board, with the endorsement of the Sixth and Ninth Circuits, actually requires an employer in all cases to prove that a union has in fact lost majority status, and improperly refuses to consider the cumulative weight of individual factors relied upon in asserting reasonable good faith doubt (Pet. 9-13). There is no merit to these contentions.

a. Contrary to petitioner's assertion (Pet. 9, 14-16), the decision of the Board and court of appeals in this case and decisions of the Ninth Circuit in other cases do not require an employer to prove *actual* lack of majority in order to establish reasonable doubt. The Board and all circuits clearly distinguish between an employer's proof of facts creating a reasonable doubt as to a union's continued majority status and proof of actual loss of majority status, while recognizing the legal efficacy of each. See, *e.g.*, *N.T. Enloe Memorial Hospital*, 250 N.L.R.B. 583, 588 (1980), enforced, 682 F.2d 790 (9th Cir. 1982); *Cain's Generator & Armature Co.* v. *NLRB*, 628 F.2d 933, 934 (6th Cir. 1980); *NLRB* v. *Tahoe Nugget, Inc.*, *supra*; *Terrell Machine Co.*, 173 N.L.R.B. 1480, 1480-1481 (1969), enforced, 427 F.2d 1088 (4th Cir. 1970). In proving reasonable doubt, however, an employer must produce objective evidence that is "clearly referable to a lack of majority support" (*Tahoe Nugget, Inc.*, 584 F.2d at 305 n.46), and may not rely solely on a series of ambiguous inferences. *Id.* at 305

& n.46; *Orion Corp.* v. *NLRB*, 515 F.2d 81, 85 (7th Cir. 1975).

The Board did not require petitioner to prove that the Union in fact lacked majority support in this case. Rather, the Board simply found that the facts upon which petitioner relied in refusing to bargain were not sufficient to support a reasonably based good faith doubt and accordingly did not justify petitioner's action (Pet. App. A76-A79).[7] Nor is there merit to petitioner's claim (Pet. 10-14) that the Board refused to consider the totality of the evidence in determining whether petitioner had a reasonably-based good faith doubt of the Union's continuing majority status. The administrative law judge expressly analyzed all of petitioner's asserted justifications "taken singularly or considered together" (Pet. App. A77).

Petitioner's claim accordingly amounts to a disagreement with the Board (and the court of appeals) as to the factual conclusions to be drawn from the evidence in the record. The court below found that the "decision of the administrative law judge in this case reflects a thorough and conscientious canvassing of the record" (Pet. App. A3) and correctly concluded that substantial evidence supports the Board's finding

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[7] Petitioner contends (Pet. 17) that the Board's approach requires an employer to poll its employees in order to prove actual lack of majority, and that such polling "invariably" would be an unfair labor practice. Because neither the Board nor the courts require proof of actual loss of majority support this contention is irrelevant. Moreover, questioning by an employer as to employees' support for a union is not necessarily an unfair labor practice. Such polling is lawful if it meets criteria designed to assuage employee fears of reprisal. *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967).

that petitioner did not have a reasonable good-faith doubt of the Union's majority support. Review of that fact-bound determination is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. In any event, there is ample support in the record for the Board's conclusion that petitioner failed to demonstrate a reasonably-based good faith doubt.[8] As the Board found, the period just prior to petitioner's refusal to bargain was one of great union activity (Pet. App. A23-A25). The factors that petitioner invoked to show union inactivity were too remote in time from the refusal to bargain to support a good faith doubt at the pertinent time (Pet. App. A76).

A clear majority of unit employees voted to strike in each of three strike votes, and all but about 11 employees honored the picket line (Pet. App. A25, A76-A77). Although some employees did not honor the picket line, neither the refusal of some employees to strike nor the return of striking employees to work justifies withdrawal of recognition from the Union. Failure to support a strike does not necessarily show lack of support for the Union. See Pet. App. A78; *Cantor Brothers, Inc.*, 203 N.L.R.B. 774, 779 (1973); *Coca-Cola Bottling Works, Inc.*, 186 N.L.R.B. 1050, 1053 (1970). As the ALJ found, "[t]here are any number of reasons why employees would work during

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[8] As noted above (page 5 note 3, *supra*), petitioner gave only three reasons for refusing to bargain in testimony before the ALJ. Petitioner's failure to mention any of the other factors upon which it purported to rely until it filed a post-hearing brief with the ALJ itself tends to show that the latter are mere post hoc rationalizations. See *NLRB* v. *Cornell of California, Inc.*, 577 F.2d 513, 518 (9th Cir. 1978).

a strike even though they supported a union" (Pet. App. A78).

Petitioner contends (Pet. 12-13) that it had a reasonably-based doubt of the Union's majority because 13 employees signed a document resigning from the Union and showed it to company president Newman (Pet. App. A75). As the Board found, petitioner violated Section 8(a)(1) of the Act by disparaging the Union and urging employees to resign and form their own union (Pet. App. A91-A92). Where, as here, an employer is guilty of having solicited union resignations and other conduct designed to undermine the Union, the employer cannot properly rely on evidence of resignations to support its asserted doubt as to the Union's majority. See *Garrett Railroad Car & Equipment, Inc.* v. *NLRB*, 683 F.2d 731, 737-738 (3d Cir. 1982); *Bellwood General Hospital*, 627 F.2d at 102; *NLRB* v. *Frick Co.*, 423 F.2d 1327, 1333 & n.13 (3d Cir. 1970). Even if the authenticity of all 13 resignations is assumed,[9] given the size of the work force, the margin of the strike vote, and the small number of employees who crossed the picket line, these resignations did not deprive the Union of a majority at the time of the strike and did not give petitioner cause to believe that the Union had lost majority support. There was no evidence presented that would have warranted petitioner's concluding that the majority who did not resign no longer supported the Union during or after the strike. Pet. App. A77.

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[9] The ALJ assumed the authenticity and continuing efficacy of all resignations, although he noted that "[o]ne or two of the employees" who had resigned stated that they had withdrawn their resignations and did not work during the strike (Pet. App. A76-A77).

Finally, petitioner contends that substantial turnover among its employees gave rise to doubt concerning the Union's continued majority status. Petitioner offered no evidence to substantiate its assertion of turnover; its undocumented assertion should not be accepted as a substitute at this late stage of this litigation. But even if it were factually founded, petitioner's contention is legally flawed. Absent credible evidence to the contrary, new employees are presumed to support an incumbent union in the same ratio as those whom they replace. *Fotomat Corp.* v. *NLRB*, 634 F.2d 320, 327 (6th Cir. 1980); *Pioneer Inn Associates* v. *NLRB*, 578 F.2d 835, 840 (9th Cir. 1978); *NLRB* v. *Washington Manor, Inc.*, 519 F.2d 750, 753 (6th Cir. 1975).[10]

c. Contrary to petitioner's contention, the court of appeals' brief per curiam opinion does not adopt the rule that an employer must show actual loss of majority status to privilege a refusal to bargain with a previously recognized union.[11] The Board did not re-

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[10] It is not alleged, and the record does not reveal, that any new employees in this case were replacements for strikers. The case accordingly does not present any of the special considerations present in such situations. Compare *Pennco, Inc.* v. *NLRB*, cert. denied, No. 81-2103 (Nov. 8, 1982) (White, J., dissenting).

[11] Even if, as petitioner claims (Pet. 16), the Ninth Circuit adheres to such a rule, this case obviously would not provide an appropriate vehicle for further review. But the Ninth Circuit has not adopted any such rule. *NLRB* v. *Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), cert. denied, 451 U.S. 906 (1981), upon which petitioner relies, plainly recognizes that an employer's reasonably-based good faith doubt as to the union's majority status justifies refusal to deal with the union even absent a showing of actual loss of majority. 623 F.2d at 577, 578-579. Read in context, the passage quoted by peti-

quire petitioner to demonstrate actual loss of majority support (see pages 9-10, *supra*), and the court of appeals merely upheld the Board's decision. Accordingly, this case presents no conflict among the circuits as to whether an employer's reasonably-based good faith doubt of a union's majority status is a sufficient basis for a refusal to bargain.

Nor, contrary to petitioner's contention (Pet. 18-24) is the result here contrary to decisions of the Fifth, Seventh and Eighth Circuits. Those cases are factually distinguishable from the present case, and reflect no difference in the governing legal principles. In each of those cases, unambiguous, unequivocal evidence supported a reasonable doubt of majority status. In *Bellwood General Hospital* employees made repeated statements to the employer's personnel director and to the union that the union "had no support" among, and did not represent, the employees (627 F.2d at 101-102). Indeed, in a letter to employees the union had conceded that it had no support at the hospital (*ibid.*). In addition, the union had been dere-

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tioner (Pet. 16) reflects only that the indicia that an employer asserts to be the basis of his doubt must be sufficient to support the belief that the union had actually lost its majority support; it is not enough that the employer have reason to believe that some erosion of union strength has occurred. Petitioner's reading of *Silver Spur Casino* obscures the important distinction between the indicia that an employer relies upon in withdrawing recognition based upon doubt as to the union's majority status and the formal evidence, presented before the Board, that a union did not in fact have majority support at the time recognition was withdrawn. It is the former that the Ninth Circuit stated must "indicate that union support ha[s] declined to a minority" if reasonably-based doubt as to the union's majority status is to be found. *Silver Spur Casino*, 623 F.2d at 579.

lict in its representational and grievance duties during an entire contract term (*id.* at 104).

In *National Cash Register Co.* v. *NLRB*, 494 F.2d 189, 191, 194 (8th Cir. 1974), employees on two occasions filed decertification petitions supported by 30% of the membership. The court noted that other evidence—such as turnover and a low number of checkoff authorizations—was ambiguous, but concluded that the employer "could properly base a good faith doubt of majority status upon the filing of [the] decertification petitions" (*id.* at 195). Here, however, petitioner was guilty of soliciting resignations from the Union (see page 3, 7 note 5, *supra*). It accordingly cannot now rely on resignations it sought to procure to justify its doubts concerning the Union's majority. *Bellwood General Hospital*, 627 F.2d at 102; *Frick Co.*, 423 F.2d at 1333 & n.13. Moreover, the document shown to president Newman here was not the equivalent of a formal petition filed with the Board to begin proceedings to decertify. There is no evidence that petitioner's employees wished to have their union decertified.

Finally, in *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), a large number of strikers were replaced and strikers who returned to work resigned from the union following a strike in which replacements were victims of picket line violence. In addition, the union conceded to the employer that as many as 50% of the strikers would not be returning to work. The court found these to be unusual circumstances that overcame the usual presumption of continuing union support among replacements. 584 F.2d at 728-729.[12]

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[12] The cases cited in footnotes 2-5 of the Petition (at 10-13) also involve facts stronger than those involved here. Each con-

2. It is well-settled that the Board has broad discretion to issue a bargaining order as a remedy for an employer's refusal to bargain. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 & n.32 (1969). Petitioner contends (Pet. 24-26), however, that, because of the delay in the Board's disposition of this case and alleged turnover among employees (see page 13, *supra*) enforcement of the Board's bargaining order is inappropriate here. But the lapse of time in this case is primarily attributable to the retirement of the ALJ originally designated to hear this case before he had rendered a fully dispositive decision. See page 5 note 2, *supra*. These circumstances afford no reason to immunize petitioner against the

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tains evidence unambiguously referable to a lack of majority support. See *NLRB* v. *Triplett Corp.*, 619 F.2d 586, 586 (6th Cir. 1980) (acknowledgement by union officers of diminished support and a steady decline in grievances); *National Car Rental System, Inc.* v. *NLRB*, 594 F.2d 1203, 1206 (8th Cir. 1979) (entire workforce replaced by strike replacements and no effort by union to contact new employees); *Dalewood Rehabilitation Hospital, Inc.* v. *NLRB*, 566 F.2d 77, 80 (9th Cir. 1977) (numerous decertification petitions and an employee vote in which majority voted to withdraw union shop authority); *Ingress-Plastene, Inc.* v. *NLRB*, 430 F.2d 542, 546 (7th Cir. 1970) (union was derelict in its duties regarding grievances and safety issues, and union representative conceded union represented less than a third of unit employees); *NLRB* v. *Laystrom Manufacturing Co.*, 359 F.2d 799, 800-801 (7th Cir. 1966) (union's conduct during bargaining cast doubt on its majority support); *Hirsch* v. *Pick-Mt. Laurel Corp.*, 436 F. Supp. 1342, 1357 (D.N.J. 1977) (factors included evidence of widespread discontent with union, fact that no employees ever voted for or otherwise indicated support for union representation, and fact that union was unsuccessful in soliciting authorization cards in response to employer's petition for election).

consequences of its unlawful refusal to bargain. Significantly, petitioner makes no claim that a bargaining order would for any reason be unfair to it. Moreover, petitioner's professed concern for the rights of its present employees is not anchored upon any facts that suggest that those employees do not wish to be represented by the Union. In any event, petitioner's employees are not without recourse should they wish to terminate representation by the Union, for they may file a petition for decertification after the collective bargaining process has been allowed to function for a reasonable period. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 705-706 (1944).

The decision below does not conflict with *Peoples Gas Systems, Inc.* v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980). In *Peoples Gas*, employees decisively repudiated their union in an election held between the employer's unlawful refusal to bargain and the Board's issuance of a bargaining order. Relying expressly on that fact, the court of appeals found that issuance of a bargaining order was an abuse of discretion because it disregarded a clear indication that the employees no longer supported the union. 629 F.2d at 50. Although the court noted the passage of time and employee turnover between the violation and entry of the bargaining order, the basis for the court's decision that a bargaining order remedy was inappropriate was that the order was imposed against the clear wishes of the employees. Indeed, the court stated: "If there is no evidence other than mere passage of time to suggest the employees no longer support the Union, the interest in restoring a previously established and wrongfully disrupted bargaining relationship would perhaps override the possibility that employee sentiment had changed" (*id.* at 50). Here, peti-

tioner has adduced no evidence to suggest that its employees no longer support the Union. The court below therefore had no occasion to discuss the appropriateness of a bargaining order remedy in a situation such as that presented in *Peoples Gas*. And there is no reason to believe that the District of Columbia Circuit would have reached a different result from the court below in this case. Further review accordingly is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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